84-1824

NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

TERRY C. KNAPP, Plaintiff-Appellee,

v.

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE, Defendants-Appellants.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

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JURISDICTIONAL STATEMENT

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May 18, 1985

11 pp

QUESTIONS PRESENTED

1. Does a school board policy requiring teachers to follow the chain of command on personal matters violate First Amendment rights?

2. Where there are legitimate, non-discriminatory reasons for the governmental action, e.g. Plaintiff's phlebitis, substantiated by the evidence which are not shown to be pretextual, can a jury verdict for Plaintiff be allowed to stand?

3. Are the parties' rights under the Seventh Amendment violated where there has been an excessive and unreasonable jury verdict remanded to the District Judge to "review the trial record, 'assess the jurors' probable reaction' to the equitable relief, and recalculate the compensatory damage award"?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Seventh Circuit are listed in the caption.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

TERRY C. KNAPP, Plaintiff-Appellee,

v.

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE, Defendants-Appellants.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

JURISDICTIONAL STATEMENT

Harry Whitaker, Russell McDavid, John Hatton, Peoria School District No. 150, a body politic and corporate, and George Burdette, respectfully appeal from the judgment of the United States Court of Appeals for the Seventh Circuit in Knapp v. Whitaker, et al., 757 F.2d 827, (7th Cir. 1985).

OPINIONS BELOW

The district court's opinion and judgment (March 30, 1983) is unreported and is reprinted at A. 46. The district court's opinion on remand (December 5, 1983) is reported at 577 F.Supp. 1265 and reprinted at A. 58. The Court of Appeals' opinion is reported at 757 F.2d 827, and is reprinted at A. 1.

JURISDICTION

This is an appeal from a decision of the Court of Appeals for the Seventh Circuit which held that School Board Policy No. 2111.10(11)[1] violated the United States Constitution and the district court judgment which invalidated

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[1] Board Policy No. 2111.10(11) states:
"[The Superintendent shall] Communicate, or cause to be communicated, to all employees, all actions of the Board relating to the several employees, and all communications made to the Board shall be through him."

that policy both on its face and as applied. This Court has jurisdiction pursuant to 28 U.S.C. §1254(2).[2] The

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[2]The provision of a local school district's board policy might not in ordinary parlance be thought to be a "state statute." But the principles enunciated by this Court in defining the reach of its appellate jurisdiction indicate that the board policy in question does come within the ambit of 28 U.S.C. §1254(2).

"For the purposes of §1254(2), local ordinances are treated as state statutes." Doran v. Salem Inn, Inc., 422 U.S. 922, 927 n.2 (1975). A "legislative" enactment of a public school district, adopted pursuant to authority vested in the school district by state statute, constitutes a "state statute" for purposes of appellate jurisdiction, Illinois ex rel McCollum v. Board of Education, 333 U.S. 203, 206 (1948), and the provision of the board policy involved in this case is such an enactment. It has "continuing force and is intended to be observed and applied in the future," King Mfg. Co. v. City Council of Augusta, 277 U.S. 100, 104 (1928); is enforceable by judicial action; and was adopted pursuant to authority invested in the school district by Illinois state statutes [the Illinois School Code, Ch. 122, §§10-2, 10-20.5, 10-21.4, 33-1 and 33-4] and specifically and expressly invested in the Peoria School District by the special charter of the State of Illinois on February 20, 1869 (A. 93).

The provisions of the school board policy constitute a legislative enactment (and a "state

(Footnote Continued)

lower court's jurisdiction was founded on 28 U.S.C. §1331 and 28 U.S.C. §1291.

The court of appeals issued its opinion on March 5, 1985. A timely petition for rehearing was denied on April 2, 1985 (A. 44). This jurisdictional statement is filed within ninety days, and a timely notice of appeal was filed in the court of appeals on April 15, 1985 (A. 90), 28 U.S.C. 2101(c).

(Footnote Continued)
statute" within the meaning of §1254(2)) as they were promulgated unilaterally by the school district as one of its regulations. Indeed the provision is a portion of the model national school boards policy promulgated by the National School Boards Association.

While it is our belief that this appeal is appropriate under 28 U.S.C. §1254(2), we recognize that this Court may disagree. In such event, these papers will be "regarded and acted on as a petition for writ of certiorari,"28 U.S.C. §2103, and for the reasons stated herein a writ should issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions of the Constitution of the United States are involved on this appeal:

> Amendment I. Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> * * *
>
> Amendment VII. In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Relevant provisions of Illinois State statutes are reprinted at A. 95.

STATEMENT OF THE CASE

Plaintiff, a school teacher and assistant baseball coach in the Peoria Public Schools, spoke to several individual board members in their homes or by telephone on topics including: (1) the suitability of the classroom assigned to him, (2) the use of contraceptives and films of live birth in his course content, (3) his reimbursement for mileage expense from the school's athletic fund at the rate of $.12 per mile, (4) the purported absence of adequate protection from liability claims afforded him by the school district,[3] (5) the negative content

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[3] Mr. Knapp apparently confused the requirement under Illinois State statute of the school district's duty to indemnify fully its (Footnote Continued)

of his personal evaluations as a teacher, and (6) the claimed ineffectiveness of the grievance procedure. On April 1, 1981, the superintendent of the school district met with plaintiff and orally reprimanded him pursuant to Board Policy 2111.10(11)

(Footnote Continued)
employees, administrators and teachers, and parents who transport students involved in extracurricular activities with the purchase from private companies of liability insurance to cover such liability claims. Either by ignorance or intent, plaintiff repeatedly represented that the district's purchase of $1,000,000 of liability insurance from private companies left himself, other employees and third party volunteers unprotected against liability claims even though state statute fully indemnifies, whether or not the district insures through a private company, against all such claims. Besides the statutory indemnification, Illinois school districts are given the taxing authority to fully fund such indemnification needs by refunding bonds. Ch. 122, Ill.Rev.Stat., §§19-8 and 19-15, et seq. The Court of Appeals also apparently confused the issue of a private insurance purchase with full protection of parents or teachers who transport (A. 26-7). Under Illinois statutes transporters are fully protected whether or not there is private insurance. There is no statutory duty to insure or to purchase insurance, only to indemnify. The question of protection is a non-issue except for plaintiff's disinformation campaign, as full protection is provided by statute.

for contacting board members in their homes or by telephone. The superintendent told plaintiff he was "not to talk to any board member about his personal employment relationships and to comply with the board policy." The Superintendent followed the oral warning with a written warning the following day. Plaintiff's April 29, 1981, evaluation similarly included a statement regarding compliance with the board policy, but expressly permitting contact on matters of general interest or public concern. In the spring of 1981 plaintiff missed a substantial part of the baseball season due to phlebitis, the onset of which was attributable to his coaching activities. Plaintiff later initiated a worker's compensation claim alleging that his phlebitis was work related. On June 15, 1981, the principal of the high school where plaintiff was employed telephoned plaintiff to inquire

about his health. Plaintiff told his principal that he still suffered from phlebitis and that he would not be able to participate in the summer baseball program. During this telephone conversation, the principal advised plaintiff that he, the principal, needed to make the decision and complete the extracurricular assignments for the coming year and that due to the uncertainty of plaintiff's prognosis and the potential need for surgery that he would not reassign him as assistant baseball coach[4] and would name a replacement.

In May of 1982, after this litigation had begun plaintiff was notified that he would be transferred from Woodruff High School because of declining enrollment and

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[4]The assistant baseball coaching position paid just under $1,400.00 per year and was non-tenured under Illinois law.

cutbacks in the science department. At that time plaintiff, a biology teacher, was the least senior of all teachers employed in the science department at Woodruff High School.

Plaintiff's claim against the school district, the superintendent and other administrators stated that he was removed from his part-time assistant baseball coaching job, denied a personal leave day with pay, given a reprimand which was placed in his file for not following board policy, and transferred to another school within the district, all in retaliation for the exercise of protected speech. The defendants maintained that plaintiff's speech was of personal interest only, was not protected, and denied that it was the reason for the decisions regarding his coaching job, the personal leave day with pay, or his transfer to another school. The defendants contended: (1) that

phlebitis and the uncertainty of his availability for the 1982 baseball season was the sole reason and the motivating reason for his replacement as assistant baseball coach; (2) the language of the board policy relating to personal leaves with pay was the sole and motivating reason for the denial of plaintiff's request for a paid leave; and (3) the lack of seniority in light of the declining enrollment at his school was the sole and motivating reason for his transfer.

The District Court's Decisions

On February 1, 1983, the trial court ruled that all of plaintiff's speech to individual board members, regardless of topic, was protected by the First Amendment. The jury was instructed that defendants violated plaintiff's constitutionally protected rights by placing any restrictions on his speech and that Board

Policy 2111.10(11) was invalid and unenforceable, having determined that it was unconstitutional both on its face and as applied to plaintiff (A. 56). On February 2, 1983, the jury returned a verdict in favor of the plaintiff and against the defendants in the amount of $514,333.00 for compensatory damages. On March 30, 1983, the trial court denied defendants' motion for judgment notwithstanding the verdict or motion for a new trial. A Notice of Appeal was filed on April 22, 1983, and the case was docketed in the Court of Appeals for the Seventh Circuit on April 27, 1983. The Court of Appeals for the Seventh Circuit remanded the case to the trial court "for reconsideration in light of the Supreme Court's decision in Connick v. Myers" on June 30, 1983. Upon reconsideration, the lower court denied defendants any relief and a second appeal was taken.

The Court of Appeals' Decision

On March 5, 1984, the Court of Appeals, although finding that two of the five topics of plaintiff's speech to board members dealt with matters solely of personal interest and not of public concern, affirmed the lower court decision that the defendants had violated plaintiff's First Amendment rights. The Seventh Circuit found that the school district had a legitimate interest in maintaining order by channeling a teacher's communication to the school board through the superintendent, which prevented the board from being overburdened with personal, job related issues more efficiently handled at the administrative level. Despite this finding, the Court in effect invalidated the board policy by affirming the lower court's decision that defendants infringed upon Knapp's constitutional right to free speech by imposing even

limited restrictions.[5] The Court of Appeals found that the jury verdict of $514,333,00 with a claim of "roughly $4,000.00" in financial loss was excessive, unreasonable and unsupported by the record and remanded the case to the district court. However, the Court of Appeals remanded with "instructions that the trial judge review the trial record, "assess the jurors' probable reaction" to the equitable relief, and recalculate the compensatory damage award to an amount between $200,000 and $400,000." (A. 38).

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[5]The Court of Appeals recognized that the reprimands and warnings were pursuant to a narrow interpretation of the board policy. It is noteworthy that there was no evidence that Board Policy 2111.10(11) was ever used to prevent the flow of communication or information. Indeed plaintiff testified the only time he attempted to comply with the policy, the information he sent to the superintendent had in fact been forwarded to all board members. There was and is no evidence of prohibition let alone prior restraint and by its own language the board policy does not permit prohibiting speech.

On remand the Court of Appeals further directed the district court to provide the parties with findings of fact on the issue of Knapp's certification to teach high school level science classes in the State of Illinois.[6]

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[6]On February 1, 1983, defendants received correspondence from the Office of the Regional Superintendent of Schools of Peoria County indicating plaintiff although "certified" to teach high school was not "qualified" to teach biology or any other high school level science course in the State of Illinois. [As to the distinction see: Lenard v. Board of Education, 74 Ill.2d 260, 384 N.E.2d 1321 (Ill.Sup.Ct. 1979).] That letter was submitted to the district court, however, defendants did not attempt to utilize it as an explanation for their decision relating to plaintiff's transfer to the grade school because the information arose following the decision to transfer which was based solely on seniority. The defendants did, however, request the district court grant an evidentiary hearing prior to considering equitable relief because on March 23, 1983, they received a letter from William Helton, Assistant Manager for the Illinois State Board of Education, also stating that plaintiff was not qualified to teach science at the high school level. That request to the district court for an evidentiary hearing was by letter dated March 24, 1983. The Court denied the request for a hearing.

Although plaintiff has attended college

(Footnote Continued)

The question of the validity, constitutionality and enforceability of Board Policy 2111.10(11) was raised initially in pre-trial motions in the district court but not decided. The district court later determined that the policy was unconstitutional both on its face and as applied, and accordingly instructed the jury and permitted argument of counsel in closing to be guided by that ruling (A. 56). No

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(Footnote Continued)
classes since 1983, the latest correspondence from the Office of the Illinois State Board of Education dated April 4, 1985, indicates plaintiff is still not qualified to teach science at the high school level. Because this issue has, we contend, been satisfactorily resolved by the Court of Appeals' remand to the district court for an evidentiary hearing and finding of facts on the issue of Knapp's qualifications to teach high school level science courses in the State of Illinois it is not the subject of this appeal. The subsidiary question of the effect of Knapp's becoming qualified through his course of studies between 1981 and 1985 vis-a-vis his lack of qualifications in 1982 when the transfer decision was made and 1983 when the trial court's equitable relief order was granted and the March 1985 Court of Appeals decision was made, will of course be presented to the district court on that remand.

defendants' verdict form was tendered to the jury. On appeal the Appellate Court reviewed this determination both as it pertained to the First Amendment protected speech issue (A. 8; 29-31) and as to the correctness of the jury instruction (A. 17, 35).

The Mt. Healthy questions were raised in pre-trial motions, during the jury instruction conferences, and in the post-trial motion. Defendants raised the issue before the Appellate Court in the principal appeal.

The defendants raised the excessive verdict issue by post-trial motion in the trial court. The issue was raised in all briefs filed with the Court of Appeals and although the Court of Appeals found the verdict excessive and unreasonable, it remanded with the directions to the trial judge to recompute the verdict based on his assessment of the jurors' probable

view of the fact issue. A petition for rehearing was denied.

THE QUESTIONS ARE SUBSTANTIAL

The questions presented by this appeal are substantial and warrant the attention of this Court for the following reasons: (1) the position taken by the district court and the Court of Appeals as to plaintiff's First Amendment rights and Board Policy 2111.10(11) is in direct conflict with the decision of this Court in Connick v. Myers, 461 U.S. 138 (1983); (2) public employers are regularly confronted with employees' personal grievances (as distinct from "whistle blowing" or statements designed to alert the public to potential wrongdoing) and the lower court decisions undercut this Court's distinction between the two; (3) the Court of Appeals' analysis and application of the decision in Connick v. Myers to the

school board policy is internally inconsistent and at odds with the District Court decision which it affirms; (4) the evidence of legitimate reasons for the actions taken with regard to plaintiff was unrebutted and not shown to be pretextual; and (5) the Court of Appeals' remandment to the trial judge of the compensatory damage award for "conjecture and recalculation" violates the parties' Seventh Amendment rights.

A. The Connick Questions

1. The Discrepancy in Lower Court Decisions Regarding Plaintiff's Speech.

The trial court ruled that school district employees have the right under the First Amendment to talk to school board members about any subject related to education or their employment. The trial court ruled Board Policy 2111.10(11) (directing that communications to board members be made through the office of the

superintendent) unenforceable in all instances (A. 56). Knapp contacted school board members concerning his classroom assignment, the content of his evaluations, the mileage allowance for coaches, the liability insurance program for coaches and volunteer parents who transport student athletes, and the general effectiveness of the school district's grievance procedure.[7] The Court of Appeals held that Knapp's complaints about classroom assignments and the content of his evaluations are clearly personal matters relating solely to his employment at Woodruff High School and are not protected speech (A. 24-5).

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[7]The grievance procedure was developed through collective bargaining with teachers' representatives. A board member's or administrator's speech to plaintiff (who is not the exclusive bargaining representative) could result, in the event it is about more than a mere personal/individual grievance of plaintiff, in an

(Footnote Continued)

On the "initial inquiry" as to whether the speech is a matter of public concern (which is an inquiry of law not fact), the Court of Appeals expressly overturned the trial judge's decision as to classroom assignments and the evaluations' content (A. 24-5). Unlike Connick v. Myers, 461 U.S. 138 (1983), however, the Court did not reverse. It affirmed the trial court's judgment for plaintiff. While it need not have entered judgment for defendants as this Court did in Connick [103 S.Ct. at 1694], the determination here that the trial court "got off on the wrong foot in this case by initially finding that" all of the speech was protected [103 S.Ct. at 1687] required remandment for a new trial of the factual

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(Footnote Continued)
unfair labor practice complaint against the district, board member or administrator. Ch. 48, §§1703 and 1714, Ill.Rev.Stat. (1984).

issues. [See point "B" below]. Had it done so, or should this Court reverse and remand for a retrial on this basis, the constitutional question could have been avoided.

2. The Court of Appeals Erred In Finding Plaintiff's Speech Was Protected.

The Court of Appeals determined that two of the five topics plaintiff spoke to board members about were personal and not protected. But we contend that its determination that the other topics, e.g. mileage reimbursement, liability protection, and the effectiveness of the grievance procedure were matters of public concern and thus protected was also erroneous. The Appellate Court took personal comments of Knapp, twisted them into a general context by their characterization and concluded they were matters of public concern. If that approach is proper, literally any employee speech is

on a matter of public concern and the Connick ruling is meaningless.

On mileage reimbursement, Knapp requested $.20 per mile reimbursement and the principal awarded only $.12 explaining that the athletic fund[8] was insufficient to pay any more. The testimony was that many of plaintiff's coaching colleagues did not even request mileage reimbursement for that very reason. Plaintiff then took his personal gripe about not being reimbursed for $.20 directly to individual board members. This contact preceded any filing of a grievance by plaintiff. He never claimed that the school district contribution of $10,000 to each athletic fund was too little or too much. He never claimed that the money was being spent

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[8]The athletic fund at each high school is made up of $10,000 of public funds from the school district and supplemented by ticket sales, car washes, booster club activities, concessions, etc.

foolishly or for illicit purposes. He never claimed any money was unaccounted for nor did he request an accounting. His only claim was that his request was not granted for $.20 but only for $.12 per mile. He characterized this as inequitable because his travel as a teacher was reimbursed by the school district itself at $.20 per mile. The athletic fund from which coaches are reimbursed for mileage was insufficient to pay more than $.12.

The Court of Appeals states this was a matter of public concern for two reasons: first, because it involved "not only Knapp but all coaches at Woodruff who travel to any high schools" and "Knapp protested on behalf of all coaches" (A. 25); and second, because the complaint was "the inequitable allocation of public funds to a select group of Peoria area high school coaches" and "was an attempt

to inform the public and the educational policy makers of Peoria that officials in District 150 were failing in their duty to properly administer the allocation of public funds."

Plaintiff's complaint was that he wasn't reimbursed at $.20 per mile. After he talked to individual board members he filed a grievance "on behalf of all coaches." But no other coaches filed a grievance or joined in Mr. Knapp's grievance. Many coaches did not even seek reimbursement, let alone inquire or complain about the rate of reimbursement. Plaintiff's effort to speak on behalf of others was nothing more than Sheila Myers' claim in Connick that she spoke on behalf of other employees. Her survey was designed to inquire into and encourage support for her position amongst fellow assistants. Certainly more is necessary to characterize a matter of public concern

than simply an individual, for purposes of his personal gripe, claiming that he speaks for a broader class of individuals, particularly when they do not participate or promote his role as spokesman.

There was no "inequitable allocation" of public funds since the school district gave each high school athletic fund $10,000 apiece. It was the private fund raising at each school that varied and the demands on each high school's athletic fund varied by the mileage their coaches drove and the number of requests their coaches made. Contrary to the Court of Appeals' statement, there was never a claim that those funds were not properly administered, or accounted for, or allocated. Indeed it is axiomatic that no more could be paid out from the fund than was taken in. And that's all that the evidence below reflected.

The liability protection issue, because it was a false issue, was not protected speech. Plaintiff told others that they were unprotected from liability exposure. But Illinois statute specifically provides full protection by means of indemnification by the school district for such transporters. Ch. 122, §§10-20.20 and 10-22.34(a), Ill.Rev.Stat.

The trial court held that the "liability insurance issue cited by Mr. Knapp affected not only Mr. Knapp but all the teachers in the district and the students and their parents as well." The Court of Appeals indicated that it was a matter of interest and concern to members of the Peoria community and that "in today's litigious society, a volunteer who gratuitously donates time and expense in transporting students is entitled to know the risks involved and the limits of liability

insurance coverage in the event of an unfortunate accident."

What the lower courts failed to comprehend is that there is now and always has been complete protection against claims through the indemnification provisions of statute. The school board's decision to purchase insurance or to self-insure does not materially affect the liability protection afforded coaches and parents. In that respect there is no risk involved for transporters. It is true that as a result of plaintiff's disinformation campaign concerning liability insurance and the protection afforded teachers and parents that teachers and parents became alarmed. Though plaintiff chose to stir up the issue of liability insurance and protection, he failed to explain to his colleagues or parents of students in the baseball program that the school district and Illinois state statute

fully protected them against any claims of liability for the transportation of students. Defendants contend that because plaintiff spread disinformation to parents and coaches, it is in effect exactly like the unprotected, false speech spoken of by this Court in Pickering v. Bd. of Ed., 391 U.S. 563 (1968).

Finally, the Court held that the effectiveness and proper operation of the grievance procedure is a matter of public concern. Illinois school districts were not legally required to provide a grievance procedure and teachers had no entitlement to it. The establishment of a grievance procedure, whether by unilateral action or collective bargaining, was a benefit provided to the teachers at the discretion of the public employer and a condition of employment. In Connick one of Sheila Myers' concerns was the non-existent grievance procedure. And

included in her questionnaire was an inquiry thereon. This Court did not find that to be a matter of public concern. The testimony established that all of plaintiff's criticism of the grievance procedure was in the context of how such procedure failed to provide him with the result he expected from his own grievances. This Court in Connick made it plain that "an individual cannot bootstrap his individual grievance into a matter of public concern...by invoking a supposed popular interest in all aspects of the way public institutions are run." Renfroe v. Kirkpatrick, 549 F.Supp. 1368 (N.D.Ala. 1982) aff'd 722 F.2d 714 (CA 11, 1984); Mahaffey v. Kansas Board of Regents, et al., 562 F.Supp. 887, 890 (D.Kan. 1983).

3. School Board Policy 2111.10(11) Is A Valid Time, Place And Manner, Content-Neutral Restriction.

School Board Policy 2111.10(11) states:

> "11. Communicate, or cause to be communicated to all employees, all actions of the Board relating to the several employees, and all communications made to the Board shall be through him (the School Superintendent)."

Policy 2111.10(11) does not prohibit communication, nor does it empower or direct the superintendent to pre-approve or withhold any communication. Instead, it channels all communications through him, not unlike any "chain of command." See: Boyd v. Secretary of the Navy, 709 F.2d 684, 687 (CA 11, 1983); English v. Powell, 592 F.2d 727, 732 (CA 4, 1979); Humphrey v. Highland Park Ind. Sch. Dist., 361 F.Supp. 451, 453 (N.D.Tex. 1973). The Peoria School District has over 2,300 employees, and it is not unreasonable to

utilize a chain of command for all communications, public or private. It was drawn from the model national school policy promulgated by the National School Boards Association, and is consistent with, if not mandated by, Illinois State regulations which specify: "The board of education shall carry out all professional and official relationships with school employees through the district superintendent." §2-2.3, Illinois State Board of Education Document Number 1, "The Illinois Program for Evaluation, Supervision, and Registration of Schools (October 1, 1977), p. 6.

Policy 2111.10(11) includes "all communications." It specifies no preference for the content of the communication or even the general subject matter which might imply a content-based regulation. This Court has ruled that if there is a rational basis for a content-neutral

restriction on the time, place or manner of speech, it is constitutionally valid. Kovacs v. Cooper, 336 U.S. 77 (1949). The Court of Appeals found there were "legitimate interests" for the policy. (A. 29.) Therefore, it was error for the court to hold that the content-neutral policy which restricts only the time, place or manner of unprotected speech is illegal.

In Healy v. James, 408 U.S. 169 (1972), the Court stated:

> "Just as in the community at large, reasonable regulations with respect to the time, the place and the manner in which student groups conduct their speech-related activities must be respected. A college administration may impose a requirement, such as may have been imposed in this case, that a group seeking official recognition affirm in advance its willingness to adhere to reasonable campus law. Such a requirement does not impose an impermissible condition on the students' associational rights. Their freedom to speak out, to assemble, or to petition for changes in school rules is in no sense infringed. It merely constitutes an agreement to

> conform with reasonable standards respecting conduct. This is a minimal requirement, in the interest of the entire academic community, of any group seeking the privilege of official recognition." 408 U.S. at 2352

See also: Heffron v. Intern. Soc. for Krishna Consciousness, 452 U.S. 640 (1981), and Frumer v. Cheltenham Tp., 545 F.Supp. 1292 (E.D.Pa. 1982).

The Court of Appeals in Perry Local Educators' Assn. v. Hohlt, 652 F.2d 1286 (CA 7, 1981), rev'd, 460 U.S. 37 (1983), distinguished content-based and content-neutral restrictions. A school board is able to place restrictions on who may use the internal mail system or the content of messages that pass through it. Content-based restrictions would, of course, be subject to a strict scrutiny; but reasonable time, place and manner restrictions would be validated if they had a rational basis. The internal mail system required that deliveries to staff be deposited with

the principal's secretary and, in that respect, is not unlike Policy 2111.10(11), which channels communication to the board through the superintendent. [Cf. Federation of Delaware Teachers v. De La Warr Bd. of Ed., 335 F.Supp. 385 (D.Del. 1971); Connecticut S. Federation of Teachers v. Bd. of Ed. Members, 538 F.2d 471 (CA 2, 1976).] This Court's decision in Perry Education Assn. v. Perry Local Education Assn., 460 U.S. 37 (1983), reversed the Court of Appeals' decision, but that reversing opinion confirms that the School Board's policy here meets and exceeds constitutional muster.

In Fujishima v. Board of Education, 460 F.2d 1355 (CA 7, 1972), the Court reviewed a prior submission/prior approval policy on the distribution of literature on school premises, but specifically noted that its injunction did not prevent the school from "promulgating reasonable,

specific regulations setting forth the time, manner and place in which distribution of written materials may occur." [460 F.2d at 1359].

In Key v. Rutherford, 645 F.2d 880 (CA 10, 1981), a police chief had been discharged for insubordination because he violated a regulation that provided that "employees are not to discuss complaints or problems with City Council members. To do so is considered grounds for dismissal." [645 F.2d at 882.] The trial court considered Section 4.11 unconstitutional on its face, but the Court of Appeals reversed holding that the regulation had to be evaluated under the Pickering balancing test. The plaintiff in Key had directed his comments to the mayor personally rather than to or through the public. The prohibition was simply as to that direct contact.

The School Board Policy here does not on its face confer to the superintendent the right to exercise any discretion as to which communications shall or shall not be passed on to the board. He serves only as a conduit.[9] There is no evidence in this record that the superintendent ever refused to forward employee communications directed to the board.[10]

When confronted with plaintiff's persistence in contacting board members at their homes about his personal gripes, the

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[9]Such policy has the salutory administrative effect of permitting the superintendent to investigate the matter and provide any further information to the Board that is appropriate. As in the case of liability protection, to provide the true information to the Board that full protection exists through indemnification provided by Illinois statute not by administration or Board choice.

[10]In fact, plaintiff was asked at trial whether he had channeled communications to the board through the office of the superintendent. He testified that he did on one occasion and that the material was, as he requested, given to the board members. [Tr. Vol. 2, p. 121]

administration responded by placing an admonition in his April 29, 1981, evaluation:

> "On several occasions he has contacted school board members concerning personal employment problems. Problems of this nature are to be discussed with the building principal or, as stated in Board Policy 2111.10, through the office of the superintendent. Mr. Knapp is to refrain from contacting board members or speaking at public meetings concerning his personal employment relationships.
>
> He is, however, allowed to contact board members about matters of general public interest. His insistence on airing personal problems directly with the board is disruptive and will not be tolerated."

The statement placed in plaintiff's evaluation is not "an attempt to silence Mr. Knapp," as suggested by the trial judge. To the contrary, Policy 2111.10(11) is cited only with respect to following the chain of command and was never used to silence plaintiff [see notes 5 and 10]. Anderson v. Evans, 660 F.2d

153 (CA 6, 1981); Barbre v. Garland Independent School Dist., 474 F.Supp. 687 (N.D.Tex. 1979); Riechert v. Draud, 511 F.Supp. 679 (E.D.Ky. 1981); Roseboro v. Fayetteville City Bd. of Ed., 491 F.Supp. 113 (E.D.Tenn. 1978); c.f. Columbus Education Association .v. Columbus School District, 623 F.2d 1155 (CA 6, 1980).

For the reasons stated, Board Policy 2111.10(11) was a valid time, place or manner, content-neutral restriction and such policy was neither unconstitutional on its face nor unconstitutionally applied to plaintiff.

B. The Mt. Healthy Questions

1. The District Court's Holding and Jury Instruction That All Speech was Protected Constituted Error.

If Knapp's unprotected speech was the causal link, he could have been reprimanded, terminated as a coach, denied

a personal leave day and transferred to an elementary school solely because he chose to take his personal complaints to school board members instead of following board policy. Connick v. Myers, 462 U.S. 138 (1983), Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977).

Since the Court of Appeals held that some of Knapp's speech was not protected, there is a question of fact as to whether penalties were imposed on Knapp for his protected or unprotected speech. But because of the trial court's decision that all speech was protected, the jury was denied the opportunity to consider this question.

At the close of all evidence, the District Court ruled whether and to what extent Knapp's speech was protected. Judge Mihm stated that all of "the speech involved in this case...is protected speech" under the First Amendment and

instructed the jury that all reprimands violated Terry Knapp's rights (A. 17-8). This instruction was in error and deprived defendants of a fair determination of the question as to whether penalties were imposed on Knapp for his protected speech as distinct from unprotected speech.

The impact of the trial judge's instruction was to preclude any possibility of a defendants' verdict form. The judge ruled that all speech to board members was protected, that Knapp's rights were violated, and that Knapp was, therefore, entitled to compensatory relief as a matter of law. Under this Court's rationale, Knapp is only entitled to relief if the jury finds that the reprimands and other actions taken against him were motivated because he exercised his "protected" speech. Defendants were prohibited by the trial court's ruling from arguing to the jury that they had the

right to reprimand, terminate his coaching or transfer plaintiff if such action were taken because he chose to air his personal grievances directly with the board instead of following board policy.

Since Knapp's personal complaints about his classroom and evaluations were not protected speech, the school district should not be barred from reprimanding Knapp for discussing such subjects with school board members. The language of the formal reprimand closely parallels the holdings in Pickering and Connick. Simply stated, Knapp was informed that he was not to air personal problems directly with the board, but that he was allowed to contact board members about matters of general public interest.

In Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274 (1977), this Court stated:

> "A rule of causation which focuses solely on whether

> protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. 97 S.Ct. 575.

Plaintiff was placed "in a better position" by using some protected speech. The jury might well have come to a different conclusion if it had been told that some of Knapp's speech was not protected, as the Court of Appeals later determined. The District Court's ruling that all speech was protected vitiated any possibility of a fair and impartial verdict on the factual issues because:

a. The jury was instructed that plaintiff's rights were violated.

b. There was no defense verdict form.

c. The jury was deprived of an opportunity to decide whether the

actions taken against Knapp were the result of speech or conduct that the Court of Appeals determined was not constitutionally protected.

2. The Lower Courts Failed to Follow The Mt. Healthy Doctrine.

This Court's decision in Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977), provides the ruling precedent in mixed-motive cases. The rulings below fail to follow this precedent. The entire trial was conducted pursuant to rulings that all of plaintiff's speech was protected, so there was no defendants' verdict form and no opportunity to distinguish protected from unprotected speech. The Court of Appeals affirmed the liability verdict rather than remanding for a new trial so that the protected speech could be divided from the unprotected. In light of Instruction No. 10, the jury did not have the opportunity to

fairly appraise the case.[11] Because of trial errors, the Mt. Healthy questions were not fairly presented.

An even more important question regarding the Mt. Healthy doctrine is presented here because the Court of Appeals recognized that this record contained sufficient evidence to support the conclusions that (1) Knapp received negative evaluations because the evaluator "observed a pattern of attitude problems";

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[11]The Court of Appeals' statement that because the district court had ruled plaintiff's speech was protected it was required to inform the jury is not disputed. What is disputed is the method chosen versus the correct method. Here the trial court chose value-laden language "plaintiff's constitutionality protected speech" which was also so generalized as to be unhelpful in differentiating with hindsight. Had the Court not invaded the jury's fact finding role and asked the question in terms of plaintiff's speech (e.g. was plaintiff's speech on classroom assignment a motivating reason...) then it could be stated whether or not liability attached when the Court of Appeals reversed on that speech as being personal and unprotected. That was not done here and it is irreparable error requiring a new trial.

(2) the principal removed him as coach due to his phlebitis; (3) Knapp was transferred because he lacked seniority; and (4) he was denied a day off with pay to see a lawyer because he failed to present any compelling reason as required by board policy (A. 32). Even though the trial rulings on what was protected speech were erroneous, the Court of Appeals stated that the jury determination should be upheld. The jury's determination of credibility and the weighing of evidence cannot be so easily segregated from erroneous procedural rulings, instructions, interrogatories, and argument of counsel. If they can, Mt. Healthy's three part procedure is rendered meaningless. Moreover, unless a plaintiff is held to some rebutting requirement of legitimate, substantial, non-discriminatory reasons proved by a preponderance of the evidence as defendants did here and as the Court of

Appeals recognized, then Mt. Healthy addresses mere form and not substance. Defendants did not concoct plaintiff's phlebitis and the likelihood in June of 1981 of the need for surgery and his unavailability for baseball. It was true.

It has been suggested that plaintiff bears a burden of persuasion and proof that the articulated reasons for the governmental actions (shown by a preponderance of the evidence) are in fact pretextual. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255-6 (1981); Nekolny v. Painter, 653 F.2d 1164, 1173 (CA 7, 1981). Here there was no rebuttal showing whatsoever by plaintiff that the phlebitis, declining enrollment/seniority, etc. were pretextual, concocted, or nonexistent. In fact, they were admitted by the plaintiff. For Mt. Healthy to mean anything under circumstances like these, it must mean that

plaintiff failed to meet his burden to rebut the legitimate, independent reasons for the defendants' actions.

C. The Remand/Remittitur Questions

The Court of Appeals decided that the jury's compensatory award of $514,333,[12] in light of Knapp's "roughly $4,000" in financial loss, was excessive because the jury did not have the opportunity to consider the effect of the equitable relief ordered by the trial court (i.e.

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[12]The record establishes that the "illness" or "emotional injury" sustained by Knapp occurred after he was given the April 29th evaluation. Defendants contend that since they had a right to reprimand for taking personal grievances directly to the Board, such injury was not compensable. Although defendants argued that the size of the verdict itself, over 110 times the amount of special damages, when compared to all other civil rights or free speech awards which have been made, [it is ten times greater than the largest prior free speech teacher (discharge or not) case found by counsel or the lower courts], "shocks the conscience" and is "monstrous" [Appellants' Court of Appeals Br. pp. 44-7; Rep. Br. pp. 35-42], the Court of Appeals made no mention of that comparative analysis argument in its decision.

expunging all documents in personnel files, reassigning him as a science teacher, and reinstating him as an assistant baseball coach at Woodruff) (A. 37). The Court of Appeals remanded the case "to the district court with instructions that the trial judge review the trial record, 'assess the jurors' probable reaction' to the equitable relief, and recalculate the compensatory damage award to an amount between $200,000 and $400,000." (A. 38). Only two cases are cited by the Court of Appeals for this novel remand and neither involve a remand with comparable instructions: U. S. v. Bruscino, 687 F.2d 938 (CA 7, 1982), and Abernathy v. Superior Hardwoods, 704 F.2d 963 (CA 7, 1983).

In Bruscino, the Court sitting in banc in a criminal case determined that the impact of two items found in the jurors' room (which were not in evidence) was best left to the determination of the

trial judge. That "inquiry into prejudice [becomes] a matter of assessing the probabilities that a particular jury was prejudiced by particular documents." [687 F.2d at 941]. The Court stated that the trial judge, with his opportunity to observe the jurors' demeanor and gauge their attentiveness and the atmosphere of the trial was in a better position than the appellate court to make the determination. Bruscino presented the sole question whether there was prejudice in the jury's deliberation.

In Abernathy, the Court remanded for a new trial limited to damages unless the plaintiffs accepted a remittitur of the judgment. It is a classic remittitur opinion in the sense that it elaborately sets out the computation and analysis of the excessive portion of the award. The Court arrived at the total amount "which could have been made consistently with the

evidence, the instructions and the closing argument of the plaintiffs' counsel" by calculating the stipulated medical expenses and discounting to present value the award for pain and suffering. [704 F.2d at 973-4].

Although Abernathy is directed to the substance of the judgment, and required some speculation on the part of the Court (i.e. as to "per diem" and the discount rate) there was a basis in the evidence and the plaintiffs' argument for making the computations required. Here there is no basis. The jury's award of $514,333 is not reflective of any parameters in the evidence, counsels' remarks, the elements of damage allowable, the instructions, or the verdict forms. It is as if the

figures were drawn from the proverbial "thin air."[13]

There are cases where the Courts of Appeal have remanded to the trial court for computing and fixing a remittitur, because the trial court saw the witnesses and heard their testimony [e.g. Natco Inc. v. Williams Bros. Engineering Co., 489 F.2d 639 (CA 5, 1974)]; but they do not support the proposition that the court can invade the province of the jury in recalculating unliquidated damage amounts without some basis in the evidence, argument or instructions. Our concern is not with the aspect of the remandment to the trial judge to make the determination,

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[13]Or "out of a hat" as a different panel of the Court of Appeals stated in Taliferro v. Angle, 757 F.2d 157, 162 (CA 7, 1985). That court pointed out that "general damages are not available in civil rights tort cases" and that "a plaintiff is not permitted to throw himself on the generosity of the jury." But that is precisely what the panel decision below permitted.

but with the absence of any standard in this record by which the decision can be fairly made.

The circumstances of this case and the instructions of the remandment call into question the defendants' rights to a fair and impartial jury determination of the matter.[14] The Court of Appeals' direction is for the trial judge to "assess the jurors' probable reaction to the equitable relief and recalculate the compensatory damage award." (A. 38). That direction ignores the parties' rights to a jury trial.[15]

In the classic remittitur example, the court is simply excising the excess amount from the jury's award and

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[14]The full text of the Seventh Amendment is found at p. 5 infra.

[15]The right is to trial by jury; not trial by a judge who has been told to think like a jury.

permitting the rest to stand (with the parties assent).[16] In the case of unliquidated damages, remittitur has been said to be "on its shakiest constitutional basis." 43 U. Chi. L.Rev. 376, 385 (1975-6). The power for a remittitur has always been limited and suspect in cases where the amount remitted is not a certain, identifiable sum, which is included in the verdict but should not have been. In this case the verdict cannot be differentiated by the evidence, elements of damage allowable, or even the argument of counsel. A retrial on damages is the only available alternative to pure speculation or conjecture on the jury's determination.

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[16]Were it not for the more than 100 year history of remittitur in American law, this logic, which itself has been severely criticized, would probably not be sufficient to meet Seventh Amendment attacks. Dimick v. Schiedt, 293 U.S.

(Footnote Continued)

A jury determination of damages is the essence of the right to trial by jury. It is consistent with the Seventh Amendment to allow the judiciary to correct jury verdicts that fly in the face of undisputed facts or fail to consider undisputed facts; it is not consistent to direct a judge to guess at what a jury might have done had it been presented with different instructions. 43 U. Chi. L.Rev. 376, 390 (1975-6). The instruction for the remand simply invites speculation and conjecture as to what the jury would have decided had it known of the equitable relief. It poses a difficult task, if not an impossible one, for the trial judge. Even if it is not in violation of the Seventh Amendment it sets a troublesome

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(Footnote Continued)
474, (1935), and 11 Wright and Miller, Federal Practice and Procedure, §2815.

precedent and represents a clear departure from established remittitur practice.

The Court in New York, C. & St. L. R. Co. v. Niebel, 214 F.2d 952 (CA 6, 1914) stated the problem best:

> "We recognize the desirability of the shortening of litigation and lessening of expense which such a remittitur may accomplish. However, in the instances in which this [remittitur] practice has been followed by the Supreme Court and by this court, there has been mathematical basis by which it could be computed, or at least closely approximated, how much of the verdict was due to the erroneous element; and we have declined to permit such a remittitur in a case where this computation could not be made; and we are not aware of any instance where this practice has been adopted by a federal appellate court, and in which the elements of damage were of such indeterminate character that there was no criterion for segregation." [bracketed material added; parentheticals omitted; 214 F.2d at 957-8].

The Court of Appeals' likely motivation in remanding with instruction, i.e to salvage the jury verdict below, to lessen expense

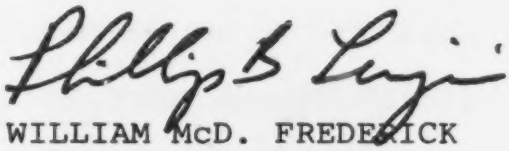
of more litigation, to shorten that litigation and to give plaintiff the benefit of a substantial part of that verdict (albeit decidedly excessive) is a worthy and understandable one. But on this record no mathematical basis or even close approximation is possible. The "Solomonic" decision which the trial court is directed to make on remand simply cannot be made. The constitutional question could have been avoided had the Court granted the rehearing petition and remanded for a new trial even if it was limited solely to the issue of damages.

CONCLUSION

For the reasons set forth above, this Court should note probable jurisdiction of this appeal. In the event this Court determines that there is no jurisdiction under 28 U.S.C. §1254(2), a writ of

certiorari should issue to consider the important questions and constitutional precedents presented here by the decisions below.

Respectfully submitted,



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May 18, 1985

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 84-1032 & 84-1060

TERRY C. KNAPP,

Plaintiff-Appellee,
Cross-Appellant,

v.

HARRY WHITAKER, RUSSELL MCDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE,

Defendants-Appellants,
Cross-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
No. 81 C 1185—**Michael M. Mihm**, *Judge.*

ARGUED SEPTEMBER 21, 1984—DECIDED MARCH 5, 1985

Before COFFEY and FLAUM, *Circuit Judges* and CAMPBELL, *Senior District Judge.**

COFFEY, *Circuit Judge.* The defendants-appellants, Peoria School District No. 150, *et al.*, appeal the jury's finding that employees of the School District infringed upon Terry Knapp's First Amendment right to speak on matters of public concern, in violation of 42 U.S.C. § 1983. The jury awarded Knapp $514,333 in compensatory damages. On cross-appeal, Knapp appeals the district court's

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* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

denial of his motion to include a claim for punitive damages. We affirm the jury's finding that the Peoria School District infringed upon Knapp's constitutional right to free speech and we affirm the denial of Knapp's punitive damage claim, but we remand this case to the district court with instructions to reduce the excessive compensatory damage award to an amount between $200,000 and $400,000. We further direct the district court, on remand, to provide the parties with findings of fact on the issue of Knapp's certification to teach high school level science courses in the State of Illinois.

I

The record reveals that in September 1977, Russell McDavid, the principal of Woodruff High School in Peoria, Illinois, hired the plaintiff, Terry Knapp, to teach biology in the science department at Woodruff and also serve as an assistant basketball coach and an assistant baseball coach.[1] According to the administrative procedures at Woodruff High School, a newly hired teacher receives two written evaluations each academic year and upon the completion of two full years of acceptable performance, the teacher is

[1] The defendants' brief on appeal contains a portion of a letter, dated March 23, 1983, from William Helton, Assistant Manager for the Illinois State Board of Education, stating that:

> "Based upon the transcripts presented for Mr. Terry Carl Knapp, he is not qualified to teach science or health education at the high school level. Qualifications for science have remained the same since 1971 which was prior to his original employment within Peoria School District 150."

The defendants claim that they presented this letter to the district court on March 24, 1983, some six days before the court granted equitable relief and reassigned Terry Knapp to his position as biology teacher at Woodruff High School. Upon review of the district court record, we are unable to locate a copy of the complete letter, any reference to the letter by the district court, or any evidence in support of the defendants' claim.

placed on tenured status. During the relevant time period, September 1977 to July 1982, the teacher evaluations at Woodruff High School were performed by the school's administrative assistant, John Hatton. On November 14, 1977, Hatton conducted his first evaluation of Knapp and stated, *inter alia*, that "Mr. Knapp has done a good job thus far in both the classroom and with his extracurricular assignments." On March 21, 1978, Hatton performed a second evaluation and wrote that "Mr. Knapp continues to do a good job as a teacher and coach at Woodruff. . . . Hopefully he will continue to perform at his current high level and maintain his cooperative attitude." The following academic year, on January 11, 1979, Hatton again evaluated Knapp, stating that "[i]n summary Mr. Knapp is a good teacher and coach. It is hoped that he will continue to make a contribution to our youth." On March 30, 1979, Hatton evaluated Knapp for the fourth time and wrote, "Mr. Knapp continues to do a good job. He is a very good classroom teacher whose knowledge, presentation and general enthusiastic attitude insures a high degree of learning for his students." Hatton added that "Mr. Knapp is very enthusiastic and intense in both his teaching and his coaching. He does have, however, a tendency at times to be too opinionated and outspoken." At the close of the 1978-79 academic year, Knapp was placed on tenured status in accord with the administrative policy at Woodruff High School.[2]

In March of the 1979-80 academic year, Knapp resigned his position as assistant basketball coach due to disagreements with the head coach and increasing family obligations. At the same time, March 1980, Knapp submitted a reimbursement request to the Woodruff athletic director for the 400 to 500 miles he logged while traveling to area high schools to scout opposing teams and while transporting players to and from basketball games in his

[2] The record reveals that in Peoria School District 150, a tenured teacher receives a continuous contract that remains in effect until the teacher resigns or is removed from his position.

own automobile. Knapp requested a reimbursement of 20¢ per mile but was informed by the Woodruff athletic director that he would receive only 12¢ a mile. Knapp complained that this policy was unfair, especially in view of evidence that teachers at all schools in District 150, including Woodruff, and coaches at other Peoria public schools received a mileage allowance of 20¢ per mile. The Woodruff principal, Russell McDavid, explained that teachers who used their own vehicles to attend educational seminars and to transport students for educational purposes (i.e. field trips) were reimbursed directly by School District 150 at the uniform rate of 20¢ per mile. McDavid added that coaches were not reimbursed for their school-related travel expenses by the School District, instead each coach received a mileage allowance drawn from the athletic budget of his particular school. The Woodruff athletic budget consisted of $10,000 in public funds from School District 150, athletic booster club donations, fundraising proceeds, and gate receipts from the various Woodruff sporting events. According to McDavid, he independently decided upon the 12¢ per mile travel reimbursement figure when the comptroller of District 150 informed him, in the fall of 1979, of the possibility that Woodruff's $10,000 in public funds may not be forthcoming for the 1979-80 academic year. Knapp claims that he attempted to grieve this mileage allowance issue as an "unfair labor practice" but that his union representative was told by George Burdette, assistant superintendent of the Peoria School District, the claim was not grievable. In any event, Knapp did not file a formal grievance on the mileage allowance issue during the 1979-80 academic year.

Later in the spring of the 1979-80 school year, Knapp approached administrative assistant Hatton and inquired as to why he had not, to date, received an evaluation and why his schedule for the following academic year was not yet complete. Hatton responded that there were "inconsistencies in the figures we have gotten back from data processing" that accounted for the delay in compiling the schedule and also for the interrupted evaluation process.

According to Hatton, when he informed Knapp of the reason, Knapp "started screaming . . . 'You're trying to screw me.' 'I'm getting hosed.' 'You're trying to transfer me.' 'My evaluation is not done.' 'You're not man enough to get this done.' " The following day, Knapp contacted Hatton and apologized for his behavior. Hatton responded that he was "willing to forget the thing" and thus in an evaluation on May 27, 1980, Hatton simply stated that "Mr. Knapp's classes are orderly and informative. He spends much time in his coaching duties."

At the beginning of the 1980-81 academic year, Knapp continued to express concern over the mileage allowance provided for Woodruff coaches, as well as the liability insurance coverage for coaches and volunteer parents in the School District who transported student-athletes in their private vehicles. According to Knapp, he had been informed of "a one million dollar umbrella policy carried by the district, that [coaches] were responsible for the first million dollar [sic] of coverage and then the School Board would pick up the remainder." Knapp further believed that the School District's insurance policy did not cover those parents who voluntarily transported student-athletes to school-related events.[3] As the 1980-81 school year progressed, Knapp joined with other teachers of the Peoria School District in demanding that a revised grievance procedure be included in the collective bargaining agreement then being negotiated between the teacher's union and the School District. On October 20,

[3] Ill. Rev. Stat. ch. 122 §§ 10-20.20, 10-22.34 (1983) provide that a School District must indemnify and protect all School District employees and authorized volunteer personnel against "death and bodily injury and property damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board." The record reveals, however, that no administrative officials of the Peoria School District nor members of the Peoria School Board informed Knapp of the state-mandated indemnification policy until after commencement of this lawsuit.

1980, Knapp attended a meeting of the Peoria Board of Education ("School Board") where Board member Cleaver "asked teachers to let her know if the [grievance] policy was not working." In response to this request, Knapp contacted another Board member, Dr. Glover, about "an administrative policy or decision that was made at Woodruff High School and it was related to mileage for coaches and insurance for coaches or parents or students who transported students." Knapp also contacted Board member Hoerr to discuss the mileage allowance for coaches at Woodruff, the liability insurance provided by the School District, and the change in his classroom assignment. Hoerr added that Knapp:

> "also expressed a great deal of concern and criticism of the administration of the high school, who were not receptive to his complaints and whom he felt were not giving him satisifaction in terms of the grievance procedure and he was not getting the desired effect that he felt was due him."

On March 24, 1981, Knapp filed a formal grievance with the School District on the issue of liability insurance and the issue of inequitable mileage allowance for Woodruff coaches. According to Knapp:

> "District No. 150 is discriminating against the coaching staff by paying some coaches 12¢ per mile and not paying some at all, while other traveling is reimbursed at 20¢ per mile. The grievant also charges that the District is placing coaches in a perilous position by requiring them to drive to and from game situations at their own risk without the protection of liability insurance for those duties."

Pursuant to Board Policy 4116.2 of Peoria School District No. 150, the first step of the grievance procedure is to discuss the problem "with the aggrieved person's principal with the objective of resolving the matter informally." If the grievant is not satisfied with the principal's decision, he may proceed to the second level and submit

the grievance to the Committee on Professional Rights and Responsibilities. If the grievant remains unsatisfied with the Committee's ruling he may appeal the decision to a body composed of the superintendent and a three person grievance subcommittee. Finally, if the grievant is still not satisfied with the result, he may present his claim to the Peoria School Board. In compliance with level one of the grievance procedure, principal McDavid reviewed Knapp's complaint and on March 27, 1981, McDavid informed Knapp, in writing, that "the situations did not qualify as 'grievances' under the definition of 'grievance' in Board Policy 4116.2." The relevant section provides that "[a] 'grievance' is a condition in the school system which an individual teacher believes is wrong, unjust, or oppressive, but excluding issues such as changes in salary and policy of the Board of Education which relates to teachers as a whole." McDavid denied the grievance, concluding that Knapp's claims were "class actions" relating to coaches as a whole.

Following receipt of principal McDavid's response, Knapp contacted members of the Peoria School Board seeking sponsorship to speak at the next School Board meeting, scheduled for April 6, 1981.[4] Knapp mailed a copy of his March 24 grievance to each Board member and enclosed a note stating that "I have talked to [board members] Dr. Glover and Mr. Hoerr concerning the material included. I will be in touch early next week." Harry Whitaker, the superintendent of District 150, learned of Knapp's contacts with Board members and on April 1, 1981, he met with Knapp to inform him that under Board Policy 2111.10(11) of the Peoria School District, communications to the Board must be directed through the superintendent.[5] According to Whitaker, he informed

[4] Board Policy 1120.10 of Peoria School District No. 150, provides that an individual must receive sponsorship from at least one Board member in order to address the Board about an item not appearing on the official agenda.

[5] Board Policy 2111.10(11) of Peoria School District No. 150

(Footnote continued on following page)

Knapp that the "Board policy that covers the superintendent of schools says that . . . all communications to the Board members will go through the superintendent." Knapp claims that he was told "[i]f you ever contact a board member about any educational issue, I will find you insubordinate and act accordingly." Following this meeting, Whitaker sent a "privileged communication" to each School Board member, providing in relevant part:

> "I asked for a meeting with Terry and met with him this morning. I pointed out that Board Policy 2111.10, Superintendent of Schools, Item # 11 states 'communicate, or cause to be communicated to all employees all actions of the Board relating to the several employees, and all communications made to the Board shall be through him.' I pointed out that this wasn't the first time that he was outside of Board policy and from now on communication with the Board should go through the superintendent. He was very argumentative, as always, and said that Board members encouraged him to call them, write them, etc. and that he was going to pay attention to the Board members. I again pointed out to him that he is outside of Board policy and that I expected him to stay within Board policy.
>
> If Terry continues to bypass the administration with regard to communications, I am going to recommend his dismissal."

The next day, April 2, 1981, superintendent Whitaker placed a letter in Knapp's personnel file summarizing the content of the April 1 conversation and stating in pertinent part:

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[5] *continued*

provides that the superintendent shall "[c]ommunicate, or cause to be communicated, to all employees, all actions of the Board relating to the several employees, and all communications made to the Board shall be through [the superintendent]."

> "I asked for the conference with Terry to point out to him that he is in violation of Board Policy 2111.10 which deals with communications being made to Board members without first sending those communication [sic] to the superintendent of schools. This has been taking place for some time and I have not been concerned. However I believe now it has become somewhat of a problem. I asked Terry at the conference to stay within Board policy. I don't believe that he was aware that he was in violation of Board policy and I believe he will not deliberately violate the policy in the future. He has been asked to remediate this aspect of his conduct."

On Friday, April 3, 1981, Knapp approached principal McDavid and asked, in writing, for a "personal day" with pay, for the following Monday, because "I would like to use Monday April 6 to consult my lawyer about threats made to me by Mr. Harry Whitaker concerning my job." Pursuant to Administrative Procedure 4152.7 of the Peoria School District, "[t]he principal or immediate supervisor may grant an employee a maximum of two days per year for urgent and compelling personal business which cannot be conducted at any other time." McDavid explained that Knapp could see an attorney during non-school hours and thus the principal denied the request. Knapp responded that in light of his April 1 conversation with superintendent Whitaker, he feared that he would be fired for insubordination. Knapp added, in writing, that "[t]his has to be done for my personal protection before Monday's [April 6] board meeting. This is the only time my lawyer was free." McDavid phoned assistant superintendent Burdette and asked for his advice. Burdette knew that Knapp was not about to be fired, as such an action would have to be approved by the office of the assistant superintendent, and thus Burdette saw no compelling or "pressing reason that we should pay a teacher to see a lawyer under these conditions." McDavid formally denied Knapp's request and instructed him to return to class. During the following period Knapp became dizzy

and nauseous, experiencing severe pains in his chest and arms that he believed to be warning signs of a heart attack. Knapp was transported, by a fellow Woodruff teacher, to the doctor's office where he was examined, given a prescription for medication, and instructed to rest for the weekend.

The following Monday, April 6, 1981, Knapp appeared at the School Board meeting, distributed an eleven page statement to each Board member, and informed the Board, in his prepared and oral remarks, that the grievance procedure was functioning ineffectively. As a specific example, Knapp related that principal McDavid denied his March 24 grievance—on the issues of the inequitable mileage allowance for Woodruff coaches and the School District's liability insurance policy—because the claims were non-grievable. In response to Knapp's statement, assistant superintendent Burdette, "outlined the exact steps of a Grievance Procedure. If the complaint is grievable, the final level is the Board of Education. If the administration feels the complaint is not grievable, nothing more happens." In addition, superintendent Whitaker explained to the School Board members that under the terms of the present collective bargaining agreement in District 150, "a complaint is not grievable if a teacher is not treated differently from other teachers in the building."

Following the School Board meeting, Knapp returned to Woodruff where he continued to teach biology courses and serve as an assistant baseball coach. On April 24, 1981, Knapp filed a second grievance with the School District, this time claiming that:

> "On April 2, 1981 I submitted a written request for a personal day for legal matters. The day asked for was April 6, 1981. On April 3, 1981 the request was denied by my principal. It is my understanding that legal days are a part of my contract as a valid personal day."[6]

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[6] According to Administrative Procedure 4152.7 of the Peoria

(Footnote continued on following page)

Principal McDavid reviewed the request and responded, in writing, that "this was not a grievable item." The next day, Saturday, April 25, 1981, Knapp coached a double-header baseball game and in the locker room afterward, he removed his elastic stocking only to observe an abnormal swelling in the upper calf region of his right leg. On the following Monday, April 27, 1981, Knapp visited a general practitioner, Dr. Lawless, who diagnosed the condition as phlebitis. Dr. Lawless prescribed medication and recommended that Knapp elevate the leg while resting at home for the remainder of the week.

On Wednesday, April 29, 1981, administrative assistant Hatton completed a year-end evaluation of Knapp, stating that:

> "Mr. Knapp spends too much time dwelling upon negative issues. He spends a great deal of time each day berating the performance of other faculty members, members of the administration of Woodruff, and the central administrative staff. He is consistently undermining the policies, procedures and general effectiveness of this school and the school district. This has a damaging effect in both the school and community.
>
> * * *
>
> On several occasions he has contacted school board members concerning personal employment problems. Problems of this nature are to be discussed with the building principal or, as stated in Board Policy 2111.10, to the office of the superintendent. Mr. Knapp is to refrain from contacting board members or speaking at public meetings concerning his personal employment relationships.
>
> He is, however, allowed to contact board members about matters of general public interest. His insist-

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[6] *continued*

School District, "legal proceedings or legal transactions" are sufficient reasons for granting a "personal day" with pay.

> ence on airing personal problems directly with the board is disruptive and will not be tolerated.
>
> In conclusion, if the above stated problems are remediated and Mr. Knapp tends to the business of teaching, the potential exists for him to become a good teacher. It is hoped that he will correct his problems and live up to his potential. The members of the administration stand ready to assist him in a normal manner to correct these problems."

In addition, Hatton recommended that Knapp be placed on remediation status, meaning that Knapp's employment would continue as long as he corrected the problems alluded to in the evaluation. Two days later, on Friday, May 1, 1981, Knapp returned to school to discuss a lesson plan with his substitute teacher and to retrieve some papers from his classroom. While checking his intra-office mail, Knapp learned that Hatton had completed the evaluation and wanted to discuss the content with him. Hatton presented the evaluation to Knapp who read it, became infuriated, and complained that "my leg started throbbing, my hands were sweating, my face was sweating, my intestines were cramping." Knapp claims that when he proceeded to the door of Hatton's office, the administrative assistant told him, "you cannot leave this office without signing this evaluation right now." According to Hatton, he informed Knapp that "you're not supposed to leave without signing this evaluation. It doesn't mean that you agree with it."

On Monday, May 4, 1981, Knapp did not return to Woodruff but had his union representative file a third grievance with the Peoria School District, claiming that:

> "Pursuant to the Board's Grievance Policy no individual shall be punished nor harassed for attempting to implement the grievance procedure. I am filing a grievance because of the continued harassment I have received since filing my original grievance. I have been harassed for filing grievances to the point that

> my health is being impaired and my ability to function as a classroom teacher is being greatly impaired. I have filed two previous grievances. The first dealt with inequitable mileage compensation and lack of adequate liability coverage. The second grievance was filed because my Principal denied me a personal day for legal councel [sic] stemming from the first grievance and ensuing harassment.
>
> The harassment can be summarized to date as:
>
> 1. Superintendent Whitaker's threats and remediation for communicating with Board members.
>
> 2. Dr. McDavid's denial of a personal day for legal use.
>
> 3. Mr. Hatton's grossly unfair teacher evaluation.
>
> 4. Mr. Hatton's curricular reassignment for next year.
>
> 5. Mr. Hatton's threat that I must sign my evaluation before I could leave his office and his follow-up denial in front of Mr. Clemmer."

On May 8, 1981, Knapp again visited Dr. Lawless complaining of recurring nausea, loss of appetite, vomiting, and headaches, along with pain in his right leg. Dr. Lawless diagnosed Knapp as suffering from acute anxiety and arranged for Knapp to meet with a psychologist, to evaluate the anxiety condition, as well as a vascular surgeon, to determine the severity of Knapp's phlebitis condition. Finally, Dr. Lawless recommended to Knapp's superiors that he be placed on a temporary leave of absence.

Knapp did not return to Woodruff for the remainder of the 1980-81 academic year. In June 1981, during the summer vacation period, principal McDavid phoned Knapp to discuss the phlebitis condition and to determine Knapp's ability to serve as an assistant baseball coach at Woodruff for the upcoming 1981-82 school year. McDavid

informed Knapp that "I really need someone that is healthy and reliable." Knapp responded that:

> "I was currently seeing a psychologist and a cardio-vascular surgeon and that at that present time the cardio-vascular surgeon scheduled a venogram to determine the extent of the phlebitical condition that I had at that time, and I was to have the venogram and then he would consider whether or not surgery was necessary. So I told him basically 'surgery is possible at this time.'"

According to Knapp, he further informed McDavid that "[t]he doctor said even if I require surgery or stripping a vein, that it shouldn't be any problem and that I would be able to resume my coaching duties in the spring." At the close of this conversation, McDavid relieved Knapp of his assistant baseball coaching position, noting that:

> "The different factors basically were, of course, he was at that time telling me that he couldn't coach baseball because baseball was causing illness, phlebitis. Along with that was reliability which I consider basically the same thing, I didn't know whether he was going to be there or not, which caused some problem with his other coaching—having to take his teams to games, and so forth. Basically I'd have to say that some of it went really back to the past year when he resigned his [basketball] coaching position. I was very unhappy about that and I think Terry and I talked about that after it was over . . . ."

In August 1981, Knapp received a medical release to return to his teaching duties and upon arrival at Woodruff, he learned that his schedule no longer included study-hall supervision, a position for which teachers in District 150 receive extra compensation. On November 12, 1981, Knapp filed the instant lawsuit, alleging, *inter alia*, that the defendants, "acting in concert, have commenced a plan and course of action to penalize Plaintiff for his exercise of the First Amendment right to make known his

views on matters of public importance in a lawful and legitimate manner," in violation of 42 U.S.C. § 1983. During the course of the 1981-82 academic year, it became evident that the Peoria School District would have to dismiss between 140 and 160 teachers the following year "due to declining enrollment and economic conditions." As a result, the School District terminated many non-tenured teachers and transferred numerous tenured teachers, based chiefly upon their years of seniority within a department, to other schools within the District. Knapp had accumulated the least amount of seniority among the five teachers in the science department at Woodruff High School. Thus, on April 13, 1982, Byron McCormick, personnel director for the Peoria schools, informed Knapp, in writing, that "unless unforseen changes occur, it will be necessary to transfer you to a different building assignment, effective with the 1982-83 school year." Following receipt of this letter, Knapp sought interviews at Peoria Central High School where teachers with coaching experience were needed in the science, health, and phsycial education departments. According to assistant superintendent Burdette, the principal at Peoria Central "did not think it was necessary to interview [Knapp] because he knew [Knapp] and, being a veteran coach and administrator in our district, was well aware of [Knapp's] coaching experience."

On April 29, 1982, administrative assistant Hatton completed another year-end evaluation of Knapp, stating, in relevant part, that:

> "Mr. Knapp was issued a 'remediation required' category on his evaluation for last year. He appears at this time to have satisfactorily resolved most of the deficiencies that were cited on this evaluation.
>
> While I still feel that Mr. Knapp's attitude is a problem, it is difficult for me to evaluate as I am currently a defendant in a lawsuit in which he is the plaintiff. I can no longer be impartial, therefore, I will not comment on this area."

On May 4, 1982, Knapp filed a fourth grievance with the district, this time complaining that Hatton's evaluation

failed to "follow the board's own procedure in evaluation of remediated teachers." Assistant superintendent Burdette responded in a letter of May 6, 1982, that:

> "Your latest grievance alleging harrassment [sic] as a result of the April 29th evaluation report appears to us to be nothing more than a thinly veiled attempt to fabricate evidence in support of your lawsuit against this district. Mr. Hatton gave you a satisfactory evaluation that requires no remediation. Since you were formally evaluated last year, it was not necessary to adhere to the formal evaluation procedures this year. Mr. Hatton is required by Board Policy to evaluate you. This evaluation procedure is Board Policy and is not grievable by you or any other employee. Accordingly, the matters raised in the grievance are not grievable."

On May 19, 1982, Knapp filed another grievance on the very same topic—Hatton's April 29 evaluation—which was again denied. Burdette informed Knapp, in writing, that the grievance "certainly appears to be an attempt to harass the administration at a time when their attention is needed to the many things necessary to have a successful conclusion of the school year for our students."

On July 16, 1982, the personnel director of the Peoria schools sent Knapp another letter, this time informing him that he was officially transferred to Harrison Grade School where he would teach science and math at the seventh and eighth grade levels. On July 27, 1982, Knapp submitted a fifth grievance, protesting "my involuntary transfer from Woodruff High School to Harrison Grade School." Knapp alleged that "had I not been improperly fired from coaching Sophmore baseball I would still be assigned next year to Woodruff." In support of this claim Knapp cited three examples of teachers at Woodruff, who held coaching positions, that were not transferred despite the fact they had less seniority than other teachers within their respective departments. Knapp further claimed that "I was never granted an interview for any of the

three positions at Peoria High . . . nor was I granted any interviews that would better match my background and certifications." Knapp presented the grievance to principal McDavid at level one, assistant superintendent Burdette and the Professional Rights and Responsibilities Committee at level two, and superintendent Whitaker at level three. Knapp's claim was considered grievable but was denied at all three levels on the basis that the School District acted properly.

On November 22, 1982, one year after the filing of this civil rights lawsuit and some three months after entry of the final pretrial order, Knapp requested leave to amend his complaint to include a claim for punitive damages. On December 17, 1982, the district court denied the request because "substantial prejudice will result to the Defendants if the Plaintiff is permitted to add a punitive damage claim." The case proceeded to trial and at the close of the evidence on February 1, 1983, the district judge ruled, from the bench, that "the speech involved in this case, the contact with the Board members orally, I mean over the phone in their homes, at the Board meeting, which is already admitted and even the transmittal to them of written documents is protected speech" under the First Amendment. In accord with this legal ruling, the court instructed the jury that:

> "The court finds that School Board Regulation 2111.11 [sic] directing that communications to Board members be made through the Office of the Superintendent is unenforceable. The actions by Terry Knapp in speaking to Board members, both individually and at a public meeting, were protected by the First Amendment of the Constitution of the United States.
>
> The court also finds that the following conduct violated Terry Knapp's rights:
>
> 1. The oral reprimand given to Terry Knapp by Harry Whitaker on April 1, 1981.
>
> 2. The language contained in the memorandum written by Harry Whitaker to the Board of Education

of District 150 on April 1, 1981 referring to Terry Knapp's violation of Board policy.

3. The written reprimand prepared on April 2 by Harry Whitaker and given to Terry Knapp on April 6.

4. The language placed in Terry Knapp's April 29, 1981, evaluation referring to his violation of Board policy."

The court further instructed the jury that based upon the evidence presented, they were to answer the following specific interrogatories:

"1. Was the plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to transfer plaintiff to Harrison School? . . .

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?

* * *

1. Was the plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to deny plaintiff a personal leave day with pay? . . .

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?

* * *

1. Was the plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to give plaintiff negative evaluations? . . .

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?

* * *

1. Was the plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to remove him as assistant baseball coach? . . .

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?"

The jury found that Knapp's constitutionally protected speech was a substantial or motivating factor in each of the defendants' four decisions and that the defendants would not have taken such action if Knapp had not engaged in such speech. Based upon these findings, the jury awarded Knapp $514,333 in compensatory damages. On March 30, 1983, the district court granted Knapp the following equitable relief:

> "All copies of written memoranda dated April 1, 1981, and April 2, 1981, and all references to any violation of Board Policy 2111.10 by Plaintiff are to be expunged from all files maintained by the Defendants.
>
> All copies of the evaluation of Plaintiff dated April 29, 1981, and April 29, 1982, authored by John Hatton and all documentation in support thereof be removed from all files maintained by the Defendants.
>
> * * *
>
> Plaintiff shall be transferred from Harrison Grade School to Woodruff High School and shall be reassigned duties as assistant baseball coach."

The court stayed the equitable relief order, pending appeal, directing that the expunged material be delivered to the defendants' counsel and that the defendants notify the district court of any vacancies occurring at Woodruff High School.

On April 22, 1983, the defendants filed a notice of appeal in this court and in an unpublished order of June 30, 1983, we remanded the case for reconsideration in light

of the Supreme Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983) ("*Connick*"). On remand, the district court ruled, *inter alia*, that "while *Connick* may be factually distinguishable from our case, even the application of the principles set forth in *Connick* do not support a change in any earlier rulings by this court." According to the court, "Mr. Knapp's speech, with its focus on the operation of the grievance procedure, was a matter of public concern." The defendants appeal the district court's ruling that Knapp engaged in constitutionally protected speech, the sufficiency of the evidence introduced at trial, the alleged trial errors, and the legal and equitable relief awarded. Knapp cross-appeals the district court's refusal to permit a punitive damage claim.

II

A. PROTECTED SPEECH

The defendants initially contend that the district court erred in ruling, as a matter of law, that Knapp's speech to members of the Peoria School Board was a matter of public concern protected under the First Amendment. According to the defendants, Knapp's speech focused only upon the job-related, personal issues of classroom assignment, evaluation content, mileage allowance for coaches at Woodruff, liability insurance for coaches and volunteer parents of School District 150, and the grievance procedure as it related to Knapp's particular disputes. The defendants rely upon the Supreme Court's language in *Connick* that:

> "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

461 U.S. at 147. The defendants claim that Knapp's speech was not a matter of public concern and thus was not protected by the First Amendment.

We begin our analysis with the Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968) ("*Pickering*"). In that case, a public high school teacher was dismissed for submitting, to the editor of a local newspaper, a factually inaccurate letter that criticized the local School Board for its past allocation of bond revenues and the local school superintendent for attempting to prevent teachers from opposing a newly proposed bond issuance. The Court ruled that the teacher's speech was a matter of "legitimate public concern on which . . . free and open debate is vital to informed decision-making by the electorate." *Id.* at 571-72. The court further reasoned that:

> "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

Id. at 568. *See also Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 414 (1979); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 284 (1977). In balancing the competing interests, the Court considered that the teacher's speech was not directed toward anyone with whom he had daily contact; the speech did not affect harmony among co-workers or the maintenance of discipline by immediate superiors; and the teacher's employment relationship with the School Board and the superintendent did not require personal loyalty and confidence for proper functioning. In view of this evidence, the Court ruled that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Pickering*, 391 U.S. at 574 (footnote omitted).

More recently, the Supreme Court in *Connick* refined the method for analyzing a case involving the First Amendment rights of a public employee. In *Connick*, an assistant district attorney was dismissed for insubordination after she circulated a questionnaire concerning internal office affairs. The questionnaire attempted to solicit staff members' views on the office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. In considering the assistant district attorney's claim that distribution of the questionnaire was protected speech under the First Amendment, the Supreme Court explained that the constitutional analysis involves a two-step process. *See Yoggerst v. Hedges*, 739 F.2d 293, 295 (7th Cir. 1984). The initial inquiry is whether the speech is a matter of public concern, for "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146. If the speech is deemed a matter of public concern, the court must then engage in the *Pickering* balancing test, weighing the interest of the public employee, as a citizen, in commenting upon matters of public concern with the interest of the State, as an employer, in promoting effective and efficient public service. The Supreme Court added that "[t]he inquiry into the protective status of speech is one of law, not fact." *Id.* at 148 n.7.

Within this analytical framework, the Court established that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. In *Connick*, the Court considered that none of the questions, except the one about pressure to work in political campaigns, sought to evaluate the District Attorney's performance as

an elected official; inform the public that the District Attorney's office was failing to discharge its governmental duties; or expose potential wrongdoing or breach of the public trust. Accordingly, the Court held that the questions were nothing more than one employee's dissatisfaction with office procedures that did "not fall under the rubric of matters of 'public concern.' " *Id.* at 148. The Court ruled, however, that "the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak freely without fear of retaliatory dismissal." *Id.* at 149. Because the question of political campaign pressure involved a matter of public concern, the Court proceeded to the second analytical step—the *Pickering* balancing test—weighing the plaintiff's interest in discussing matters of public concern with the interest of the District Attorney's office in providing efficient services for the public. The Court considered numerous factors, including (1) whether the speech impeded the employee's ability to perform her responsibilities; (2) the importance of close working relationships with superiors and co-workers; (3) the time, place, and manner in which the speech was delivered; and (4) the context in which the underlying dispute arose. *Id.* at 150-54. *See also Zook v. Brown*, 748 F.2d 1161, 1166 (7th Cir. 1984); *McGee v. Jim Hogg County, Tex.*, 730 F.2d 1009, 1013 (5th Cir. 1984). Based upon these factors, the Court concluded that:

> "Myers' questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."

Connick, 461 U.S. at 154.

In the present case, the issue is whether Knapp's oral and written communications with members of the Peoria School Board are matters of public concern, protected under the First Amendment. We realize, of course, that "[b]ecause of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal, . . . [there exists no] general standard against which all such statements may be judged." *Pickering*, 391 U.S. at 569. *See also Egger v. Phillips*, 710 F.2d 292, 315 (7th Cir.) (*en banc*), *cert. denied*, 104 S. Ct. 284 (1983). In resolving Knapp's claim that the Peoria School District infringed upon his constitutional right to free speech, we are guided by the Supreme Court's analysis in *Pickering* and *Connick*. The record indicates that Knapp contacted School Board members concerning his classroom assignment; the content of administrative assistant Hatton's evaluations; the inequitable mileage allowance for Woodruff coaches; the liability insurance provided by Peoria School District No. 150 for coaches and volunteer parents who transport student-athletes to school-related activities; and the general ineffectiveness of the grievance procedure within District 150. The issues of Knapp's classroom assignment and the content of his evaluations are clearly personal matters relating solely to Knapp's employment at Woodruff. Knapp's speech on these issues was not an attempt to inform the public that the administrators in District 150 were failing to discharge their governmental responsibilities. Moreover, Knapp's speech on these subjects was not aimed at uncovering a wrongdoing or breach of the public trust among Peoria School District administrators. Instead, Knapp simply disagreed with certain internal decisions made by his immediate superiors at Woodruff High School. While principal McDavid, as a matter of good judgment, should have been receptive to any constructive criticism offered by Knapp, "the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick*, 461 U.S. at 149. Accordingly, based upon the content, form, and

context of Knapp's complaints about classroom assignment and evaluation content, we hold that such speech is a matter of personal concern, not a matter of public concern.

The issue of inequitable mileage allowance involves not only Knapp but all of the coaches at Woodruff who travel to area high schools to scout opposing teams and who transport student-athletes to school-related events in their own vehicles. According to the established policy in District 150, each high school maintains a separate athletic budget to pay for such items as uniforms, equipment, and coaches' travel expenses. These athletic budgets generally consist of public funds distributed by the School District, as well as monies collected from athletic booster clubs, fundraisers, and gate receipts. At Woodruff, a substantial portion of the athletic budget ($10,000) consisted of public funds received from the Peoria School District. The comptroller of District 150 informed principal McDavid of the possibility that these funds may be cut for the 1979-80 academic year, and thus McDavid independently decided upon a 12¢ per mile reimbursement figure for Woodruff coaches. Knapp protested, on behalf of all coaches at Woodruff, that McDavid's decision was unfair as coaches at other Peoria public high schools received 20¢ per mile for travel expenses. In the context of this case, Knapp's complaint focused upon the inequitable allocation of public funds to a select group of Peoria area high school coaches. Indeed, McDavid testified that in computing the 12¢ per mile figure, he contacted three other high school principals in District 150 and discovered that "there was a difference from school to school" on the mileage allowance for coaches. The School District offered no explanation for the inequalities in athletic-related travel reimbursement nor did it promulgate any regulation to assure that public funds earmarked for athletic budgets be distributed evenly to coaches throughout the District. Knapp's speech to the School Board on the issue of mileage allowance was an attempt to inform the public and the educational policymakers of Peoria that officials in District 150 were failing in their duty to properly administer the allocation

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TERRY C. KNAPP,

Plaintiff-Appellee,

v.

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150,
a body politic and corporate, and GEORGE BURDETTE,

Defendants-Appellants.

On Appeal From The United States Court Of Appeals For The Seventh Circuit

MOTION OF APPELLEE TERRY C. KNAPP TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Is the invalidation of the superintendent's interpretation of a single paragraph of his job description which conflicts with school board policy on communications with the board a sufficient basis to invoke the mandatory jurisdiction of this Court?

2. Are the jury's factual findings that Defendants-Appellants engaged in a course of conduct in retaliation for Plaintiff's exercise of his First Amendment right of free speech upheld by both the trial court and a by the unanimous panel of the Seventh Circuit a proper subject for review by this Court?

3. Do the Defendants-Appellants have standing to challenge the remittitur of a jury verdict on the basis that the trial judge is given some discretion to determine the ultimate amount of the remittitur?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Seventh Circuit are listed in the caption.

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No. 84-1824

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

TERRY C. KNAPP, Plaintiff-Appellee,

v.

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE, Defendants-Appellants.

On Appeal From The United States Court of Appeals For The Seventh Circuit

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MOTION OF APPELLEE TERRY C. KNAPP TO DISMISS OR AFFIRM

Terry C. Knapp, Plaintiff-Appellee, respectfully moves to dismiss or affirm the Judgment of the United States Court of Appeals for the Seventh Circuit pursuant to Rule 16(1)(c) and (d). Alternatively, Terry C. Knapp, Plaintiff-Appellee, moves to deny certiorari on the basis that Defendants-Appellants raise no questions warranting review.

NATURE OF THE CASE

On November 12, 1981, Terry C. Knapp, a public high school teacher, filed a suit against Peoria School District No. 150 and three individually named Defendants, Harry Whitaker, Superintendent of Schools; Russell McDavid, Principal of Woodruff High School; and John Hatton, Assistant Principal, alleging an abridgment of his First Amendment right to free speech and further alleging that Defendants had retaliated against him for exercising his First Amendment rights[1/]. An additional Defendant, George Burdette, the Assistant Superintendent of Schools, was named at a later date.

Immediately prior to the trial Plaintiff filed a Motion for Partial Summary Judgment requesting that

---

[1/] Terry Knapp was originally employed in the fall of 1977. After two years of satisfactory service he entered upon contractually continued service pursuant to Ch. 122, Section 24-12, Ill. Rev. Stat.

the Court find as a matter of law that his speech was protected by the First Amendment and that certain actions, including written reprimands for speaking to the School Board both publicly and in private meetings, be found to constitute a violation of his First Amendment rights. After hearing the evidence the Court ruled that Knapp's speech was protected and certain actions including reprimands were violations of Knapp's constitutional rights.[2/]

The jury was advised of the Court's ruling and at the request of the Defendants-Appellants, the jury was given an issues instruction and several two-part interrogatories which asked whether Knapp's protected speech was a "substantial or motivating factor" in the Defendant-Appellant's decision to deny him a personal

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2/ Defendant's counsel conceded at trial that if Knapp's speech was protected, the various reprimands Knapp received would be violative of Knapp's First Amendment rights.

day, give him negative evaluations, and remove him from his coaching position. See Appendix B, pages 1-7[3/]

The jurors were further asked in each interrogatory "Would the defendants have taken the same action even if the Plaintiff had not engaged in constitutionally protected conduct?"

In each instance the jurors answered the interrogatories in support of the position of the Plaintiff and awarded $514,333 in compensatory damages. On appeal, the Seventh Circuit affirmed the finding of liability, but made the determination that a partial remittitur to a figure between $200,000 and $400,000 was appropriate since the jury did not have an opportunity to fully assess the impact of the equitable relief awarded by the District Court (A38).[4/]

[3/] Hereinafter the Appendix to this brief will be designated as B page number

[4/] References to (A number) are to the Appendix pages in Defendants-Appellants' Appeal Appendix.

Defendants appeal from the decision of the Seventh Circuit.

STATEMENT OF FACTS

In the fall of 1980, the School District and teachers were engaged in collective bargaining negotiations. (A62) During the negotiations, one of the major topics was the ineffectiveness of the existing grievance procedure. (A62)

The topic was discussed by the School Board at a public meeting on October 20, 1980. At that meeting board members publicly requested that individual teachers with knowledge and examples of why the grievance procedure was not working come forward. (A6, A7, A8, A62, A63)

After this meeting, Knapp came forward as requested and spoke to several individual board members after seeking permission from each individual to do so. (A64-65, A78)

The board members encouraged Knapp and requested that he contact them again in the future.

(A78)

The major thrust of these communications were to explain how the grievance procedure had failed to work in the past. (A63-64) As noted by the trial judge:

> "The Defendants in their memorandum attempt to place each of the examples cited by Mr. Knapp evidencing the ineffectiveness of the grievance procedure on an equal footing. However, at trial the primary focus was on the grievance procedure itself and the examples of its ineffectiveness in dealing with the mileage reimbursement and liability insurance issues. The classroom allocation and curriculum issues received relatively little attention during the trial." (A64-65)

Superintendent Whitaker was informed by individual board members of Knapp's contact with them in the fall of 1980. (A65) Whitaker made no effort to advise either Knapp or the individual board members that Knapp's conduct was in any way improper. (A65)

In March, 1981, Knapp filed a grievance based on (1) unequitable mileage reimbursement and (2) lack of liability insurance provided to coaches who drove students to athletic events. This grievance was denied on the basis that they were policy issues and not personal issues affecting an individual teacher. (A65)

After receipt of the denial of the grievance, Knapp contacted individual board members to receive sponsorship to speak at the upcoming April 6, 1981 board meeting. (A66) At the request of board member Ed Glover and with the specific permission of Russell McDavid, his principal, Knapp sent copies of his grievance to all board members. (A66) Board member Marilyn Katay agreed to sponsor Knapp so that he could speak at the April 6, 1981 meeting. (A66)[5/]

On April 1, 1981, Superintendent Whitaker met with Knapp and reprimanded Knapp for contacting board members. (A66) At this meeting Whitaker advised Knapp for the first time of the existence of board regulation 2111.10 (11), which is a paragraph in Whitaker's job description, and Whitaker's interpretation

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5/ Defendants-Appellants fail to even mention Knapp's speaking at the public School Board meeting in their Statement of the Case. Knapp's speaking at the April 6, 1981 Board meeting is a crutial fact since the retaliatory conduct started when he made known his intention to speak publicly at this Board meeting and continued after his public speech.

of it. According to the trial judge:

> "Whitaker told Knapp at this meeting that he was 'not to talk to any board member about any educational issues.' Mr. Knapp indicated to the Superintendent that he felt this violated his rights, to which Mr. Whitaker responded 'Your rights end where my nose begins". Mr. Whitaker concluded by indicating that any further contacts by Knapp to board members would result in Mr. Knapp being found insubordinate." (A66, A67)

The same day Whitaker sent a letter to the Board of Education members criticizing Knapp for contacting board members, and indicating he would monitor Mr. Knapp's conduct in the future. (A66)

On April 2, 1981, Knapp requested a personal leave day so that he could speak to a lawyer about his rights to speak at the April 6, 1981 board meeting. This request was denied on April 3, 1981. (A70) On April 6, 1981, Knapp received a written reprimand dated April 1, 1981 from Whitaker for speaking to board members. (A71)

At the April 6, 1981 board meeting, Knapp was called to the podium by board member Marilyn Katay and spoke about what he perceived to be problems with

the grievance procedure. (A72)

On April 29, 1981, Knapp was given an evaluation which included an admonishment for talking to board members both individually and at a public meeting about his personal employment problems and directed him to refrain from speaking in the future. (A72) He was placed on remediation status, which was one step above discharge.

In June of 1981, Knapp was removed from his baseball coaching position at Woodruff High School. In the fall of 1981, Knapp's study hall assignment for which he received additional compensation was taken from him. He was given a second critical evaluation and was involuntarily transferred from Woodruff High School to Harrison Grade School at the end of the 1981-82 school year. (A73)

In the fall of 1981, Plaintiff commenced the instant lawsuit alleging:

> "Defendants were conspirators engaged in a scheme and conspiracy designed and intended to deny and deprive (Terry Knapp) of rights guaranteed to (him) under the Constitution and laws of the United

States . . ." (A39)

Immediately prior to the trial of this case, in January, 1983, Plaintiff Knapp filed a Motion for Partial Summary Judgment alleging that his speech was protected and that certain actions taken directly in response to his speech, i.e. (1) Whitaker's oral reprimand on April 1, 1981; (2) Whitaker's letter to the Board of Education dated April 2, 1981; (3) Whitaker's memo to Knapp dated April 2, 1981, and received by Knapp on April 6, 1981; and (4) the language in the April 29, 1981 evaluation seeking to reprimand Knapp for his speech, were unlawful since they sought to punish Knapp for engaging in constitutionally protected conduct. The trial judge withheld ruling on said Motion until the close of all evidence in the case. At the close of all evidence the trial court ruled that with regard to the major issues raised by Knapp, i.e. the failure of the grievance procedure to resolve the mileage and liability insurance problems, that Knapp's speech was protected.

With regard to the question of the enforceability

of Board Regulation 2111.10 (11) the trial court stated:

> "There are other things that have been discussed that perhaps more clearly could be labeled "personal" and other matters which could be labeled more properly as "public' or "general interest matter." My perception of the law is that when a public employee is attempting to exercise free speech — exercise something that falls under the area of free speech — that it is encumbent upon the employer to establish that the regulation — admittedly we are not really necessarily talking about prohibition — that there is a reason for the regulation, that it is a legitimate regulation and it is legitimately applied to this particular person. There is no question in my mind that in some way the Peoria Board of Education could formulate personnel rules, could be contained within the teacher's job description or in any other fashion, could formulate proper constitutional regulations that limit the contact or the nature and the form of the contact that a teacher has with a school board. There are all sorts of reasons for that. Some of them have been expressed in this trial.
>
> I don't believe that they did that in this case, and I don't believe that it was done, from what I have heard — I don't believe that the rule in the form that it does exist — was intended to deviously avoid that issue. I just don't think it was done. But the rule, as it exists, only exists in the superintendent's job description, and what it says is, as part of his several duties: 'communicate or cause to be communicated to all employees all actions of the board relating to the several employees and all communications made to the board shall be through him'.
>
> I feel that it is absolutely critical when there is an effort made to either establish or to use a

regulation or apply a regulation to an employee, a public employee, that regulation be clear, that it be concise, that it give them some prior notice of the fact of what is expected of them, even in terms of what they are expected to do or not to do. If such a regulation did appear in a job description of the teacher or in the personnel rules, in my opinion whether or not a particular teacher had taken the time to read that rule or not is a different question. But based on my perception of this case, I don't believe -- first of all, I believe it was encumbent upon the school district to formulate a clear and concise rule which had a legitimate purpose for its existence. I don't believe that Item No. 11 under the 'job description of the superintendent of schools' fits that bill.

Secondly, more specifically, even if I had determined that this was a — in the general sense a reasonable regulation in other respects, I think there are serious problems with this wording in terms of its vagueness, which is one of the tests that is considered in many of the cases involving this type of regulation. What it says is, 'And all communications made to the board shall be through him.' That wording in no way distinguishes between oral communications and written communications. It in no way distinguishes between matters of 'personal concern' and matters that may have more of a general interest either to the board or to the public generally. It doesn't even establish a procedure or allow for a procedure, as I read it, that would necessarily allow a teacher to contact a school member about speaking at a board meeting without doing that through the superintendent's office, even if there was no discussion about what the content of the presentation was going to be.

The bottom line is I just simply believe that it does not fit the bill in terms of establishing a reasonable

guideline that someone — and unfortunately — today more often than not ends up being in court deciding whether or not it is a reasonable regulation or not. But this Item No. 11 simply does not do that.

As to the question raised by Mr. Cannell concerning to what extent can a board member say to someone, 'I don't want you to bother me, you're bothering me, leave me alone,' that is somewhat of a different question. It is an interesting question. I'm not sure that it controls in this situation. And that is the basis for this lawsuit.

There is no indication in this case that any of these people whom he contacted ever said to him directly, 'I don't want you to call me anymore' or 'I don't want you to come over to my house,' or anything like that. I guess perhaps a follow-up question would be to what extent must a school board member take it upon himself or herself to indicate that they don't want contact? But in any event, I don't believe that question, however it was resolved, controls the facts in this case.

Actually, after listening to the testimony, I was a little — I was still unsure as to exactly what the position of the defendants was as to what would not be protected and what would be. For a period of time during the trial I thought that the defendant was going to argue that the only application of this rule concerned written communications and that there wasn't any rule that regulated or prohibited oral communication. I'm not sure of that now. And I think it is just another example — through no fault of counsel. I think counsel has done an excellent job of presenting the position of the school district — but I think whenever a Court, after listening to lengthy testimony at a trial such as this, still has that substantial question in my mind as to what the

> parameters of this written regulation are. I think it makes it easy for me to say that this regulation has to fall in the terms of acting as a legitimate regulation after that. (B9-19)

Based on the ruling above the Court made the determination to give Instruction No. 10. The trial judge noted:

> Instruction No. 10 was given because the Court concluded that the jury had to know that the Court had determined the protected nature of the speech. If this had not been done, the jury would have been forced to consider the interrogatories in a vacuum. If the speech was not protected, the interrogatories were meaningless to begin with." (A88-89)

The Seventh Circuit concurred in the ruling of the trial court stating:

> ". . . In order for the district court to present this question to the jury, the court was required to inform the jury of its ruling that Knapp's speech was constitutionally protected. See e.g. Czurlanis v. Albanese, 721 F.2d at 108. Furthermore, in the context of this case, the district court was required to inform the jury that the defendants could not rely upon Board Policy No. 2111.10 (11) to justify their actions because that provision improperly restricted speech on matters of public concern. Accordingly, we agree with the district court and held that it was necessary, and not error, to instruct the jury that Knapp's speech was constitutionally protected." (A31)

The Seventh Circuit further noted that:

1. Whitaker's oral reprimand of April 1, 1981;
2. Whitaker's confidential memo of April 1, 1981 to the Peoria School Board;
3. Whitaker's written reprimand dated April 2, 1981; and
4. Administrative Assistant Hatton's reference to Knapp's violation of Board Policy 2111.10 (11)

were admitted by the Defendants to be in direct response to Knapp's communication with school board members. Since Knapp's speech was constitutionally protected, each of the above actions were constitutionally impermissible. (A35 - A36)

The remaining issues of liability, i.e. refusal of personal day; negative evaluations of April, 1981 and April, 1982; removal as baseball coach; and transfer of Knapp from Woodruff High School to Harrison Grade School were submitted to the jury. Special interrogatories based on language propounded by the Defendants was submitted for each of the four issues.

The jury, after deliberations, answered each of the special interrogatories in support of the position of Knapp and awarded compensatory damages in the amount of $514,333. (A37)

Thereafter, in addition to the compensatory damages, the District Court later awarded equitable relief consisting of expungement of all documents in his personnel file relating to the constitutionally protected speech; reassignment to a position as a science teacher at Woodruff High School; and reinstatement of Knapp as a baseball coach. (A37)

The Court of Appeals found that Knapp's damages consisted of $4,000 in financial loss; the mental suffering, emotional distress, and humiliation within the Peoria community resulting from his exercise of constitutionally protected speech; and loss of professional reputation following the District Court's order of equitable relief. (A37)

The Court of Appeals made the determination that since the jury was not appraised of the equitable relief,

the award was excessive and remanded the case to the trial court with instructions to the trial judge to review the trial record, "assess the jurors' probable reaction" to the equitable relief, and recalculate the compensatory damage award to an amount between $200,000 and $400,000. (A38)

ARGUMENT

I

THE APPEAL SHOULD BE DISMISSED SINCE IT DOES NOT PRESENT A FEDERAL QUESTION AND SINCE THE JUDGMENT BELOW RESTS ON AN ADEQUATE NON-FEDERAL BASIS

The Defendants state as the jurisdictional question:

> "Does a school board policy requiring teachers to follow the chain of command on personal matters violate First Amendment right? (See Question presented page (i).)

As noted in the decision of the trial judge, the proported policy upon which the Defendants rely was a single paragraph in the superintendent's job description. (B24-27) The interpretation placed on the language by the superintendent was unknown even to long-time

board members until after an April 1, 1981 meeting between Whitaker and Knapp. At issue here is whether this one paragraph of a job description taken totally out of context and applied in a discriminatory manner is a "statute" for purposes of Supreme Court jurisdiction and whether the finding of the trial court and Court of Appeals that "the Defendants could not rely upon Board Policy No. 2111.10 (11) to justify their action because that provision improperly restricted speech on matters of public concern" is the type of issue which requires the Supreme Court to exercise its mandatory jurisdiction or its supervisory jurisdiction as a petition for certiorari. (B26)

The trial court and Court of Appeals carefully explained their rationales. They did not quarrel with the general position that a school district had wide latitude to adopt an appropriate "chain of command" regulation that would limit access by teachers in airing personal gripes or matters of only internal concern. The superintendent's job description, which in no way on its

face limits its application to personal matters, is not a statute which requires the mandatory exercise of the court's jurisdiction.

What is involved here is a discriminatory and unprecedented application of one paragraph of the superintendent's job description to a teacher which is totally inconsistent with the School Board's other regulations which govern contact between board members, teachers, and the public. (B20-23, B28)

The major issues raised by Knapp were properly found by both the trial judge and Court of Appeals to be legitimate matters of public concern. (A25, A26, A27, A28). The question of whether particular speech involves matters of public concern is a factual determination. (A25) As noted in Pickering v. Board of Education, 391 U.S. 563 at 569 (1968).

> "[b]ecause of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors . . . to furnish grounds for dismissal, . . . [there exists no] general standard against which all such statements may be judged."

In Connick v. Myers, 461 U.S. 138 (1983), this Court reaffirmed that the determination of whether speech is protected required an analysis of the content, form, and context of the speech. The Court of Appeals carefully reviewed the legal standards to be applied (A20-A25) and the circumstances of each of the topics about which Knapp spoke. (A25-A28) The Court carefully and completely explained its reasoning. On the question of inequitable mileage allowance, the Court of Appeals state in part:

> "Knapp's speech to the School Board on the issue of mileage allowance was an attempt to inform the public and the educational policy makers of Peoria that officials in District No. 150 were failing in their duty to properly administer the allocation of public funds . . ." (A25)

On the question of liability insurance, the Court of Appeals state in part:

> "The liability insurance coverage provided by School District No. 150 for all coaches and volunteer parents who transport student-athletes to school-related events in their own vehicles is, likewise, a matter of interest and concern to members of the Peoria community . . . The failure to provide the citizens of Peoria with such insurance information borders upon a breach of the School District's duty to inform the community of

> the public school system's policies concerning potential liabilities . . ." (A26)

Although certain indemnification procedures exist under Illinois law, the Court of Appeals specifically found:

> "The record reveals that the defendants never informed Knapp nor any members of the Peoria community of this state-mandated indemnification policy before Knapp presented the matter to the School Board . . ." (A26-A27)

The Court of Appeals recognized that the functioning of a grievance procedure is generally an internal issue but found:

> ". . . In the present case, however, the grievance procedure was the subject of ongoing collective bargaining negotiations between the teachers' union and the administrators of Peoria School District No. 150. Board member Ketay requested that teachers comment upon deficiencies in the grievance process and administrators of the School District openly sought input on the grievance procedure in order to effectively negotiate the issue with the teachers' union. In the context of this case, the grievance procedure was a legitimate matter of interest for the citizens of Peoria who, as taxpayers, had a financial stake in the settlement reached between the teachers and administrators in District No. 150. . ." (A27)

The retaliatory actions taken against Knapp began on April 1, 1981, immediately after he sought to bring

these issues to the attention of the public by seeking sponsorship to speak at a public School Board meeting. Until Knapp made known his desire to speak publicly abut the mileage reimbursement and insurance policies, no action was taken to limit his access to the Board. Long-time School Board members did not know of any limitation on their right to speak with teachers. A review of the teachers' job description and Board Policies with regard to speaking at Board meeting contain no mention of any chain of command restriction. The policy and practice with regard to employee involvement at board meetings encourage such involvement. (See School-Community Relations, B20) Numerous teachers including Knapp have spoken to the School Board on a large number of topics. The "policy" upon which the Defendants are now seeking to rely is an after-the-fact rationalization taken totally out of context which was applied only to Knapp in an effort to prevent him from speaking to the Board of Education on matters such as liability insurance and

mileage allocations which were clearly of public concern.

The alleged "policy" was only applied in a single instance where a public employee with the consent of elected public office, sought to speak at a public meeting.

The Defendants next assert that because some of the topics upon which Knapp spoke were found to be unprotected, i.e. classroom assignment and evalutions' content, the trial court findings should be reversed. This assertion is directly contrary to this Court's analysis in Connick.

This Court stated:

> "Because one of the questions in Myers' survey touched upon a matter of public concern, and contributed to her discharge we must determine whether Connick was justified in discharging Myers." Connick, 461 U.S. at 149 (emphasis added)

The Defendants invert the analysis in Connick. The trial court and Seventh Circuit have both found that the major topics about which Knapp spoke, i.e. the failure of the grievance procedure to resolve the

insurance liability and mileage reimbursement problems, were matters of public concern. Pickering, 391 U.S. 563 (1968)

The appropriate step is to balance Knapp's right to speak against any disruption caused by his speaking. As repeatedly reaffirmed by Defendants' counsel:

> "We are not going to have a factual question here for the jury on whether or not the speech disrupted the activities at Woodruff High School. The jury is not going to be called upon to answer that question because we don't have a disruption issue here." (A28, A82)

Further, the Seventh Circuit applied the Pickering balancing test and weighed Knapp's interest, as a citizen, in discussing matters of public concern against the School District's interest as an employer, in promoting efficient public service stating:

> "The initial, often determinative, question is whether the speech interferes with the employee's work or with the efficient and successful operationg of the office. Knapp's speech clearly did not interfere with his teaching responsibilities, as Knapp continued to teach in the science department at Woodruff High School for more than a year after he spoke with the School Board members.

****

> "Moreover, we are not presented with a case of close working relationships between teachers and administrators in District 150, where Knapp's speech caused disruption or threatened to destroy employee morale within Woodruff High School much less the Peoria School District. Knapp's speech, on behalf of other teachers, coaches, and volunteer parents, was directed at certain policies of the School District, not at any particular person with whom he had daily contact.
>
> ****
>
> "The record further reveals that the time, place, and manner in which Knapp delivered his speech to the School Board did not interfere with his teaching responsibilities. Knapp discussed the inequitable mileage allowance, the liability insurance, and the grievance procedure issues with board members on his own time and at a regularly scheduled School Board meeting, with the sponsorship and approval of board members."

See also the opinion of the trial court rejecting Defendant's position at A80-A84.

It is clear that Knapp's speech was protected since there was no disruptive effect to counter balance against Knapp's right to speak even had only one topic been found unprotected. Obviously, it is inappropriate to reweigh the balance struck by the Courts below on an appeal to this Court. The Courts below applied the correct standards and found more than sufficient evidence to find the speech protected.

The issues concerning whether some but not all of the speech would be protected was never presented to the trial judge either in argument or by proposed jury instruction. In fact, at trial, counsel for the Defendants asserted that if the speech was protected then the reprimands were improper. At trial, Defendants' counsel stated:

> "MR. CANNELL: He has an absolute right to speak at the board meeting. If we punished him because he spoke at the board meeting, we are wrong. Now, there is no argument about that. I think that's what the cases hold. So, therefore, I think the Court's decision with respect to the speech at the board meeting must be that that is protected speech. I think both of the witnesses so indicated."

> "MR. CANNELL: But I think we are making a lot to do about nothing because I have already told the Court that Mr. Knapp had a right to go to a board meeting and address the board about general matter that some of the witnesses testified that the manner in which he addressed the board was not in violation of board policy. So I must conclude that as a matter of law what he did at the board meeting on April 6th—that particular day—was protected speech because my witnesses said that. And I can't think back what they said. Now, there was one witness who thought that some of his remarks at the board meeting concerning his superiors may not be protected speech, but I don't want to get into that because I'm not in a position to ever suggest to anyone that teachers can't go to a board meeting."

Both of these statements were made at the close of all the evidence in the case.

Further, at trial, the Defendants never urged as a basis for their actions in denying a personal day, negative evaluations, removal as a baseball coach or transfer from Woodruff High School to Harrison Grade School, the rationale that it was done in retaliation for unprotected speech. As noted by the trial court:

> "At the trial, the overwhelming thrust of the defense was that legitimate reasons existed for every action that the Defendants took and their conduct was not pretextual. Apparently now, on appeal, the Defendants have decided to change the focus of their defense."

It was the Defendants' formulation of the issues and special interrogatories which was the basis for the instructions presented to the jury. The major theme throughout Knapp's speech was the inability of the grievance procedure to work. (A80) The catalyst for retaliation was Knapp seeking board member sponsorship to speak at a public meeting. Defendants did not at trial and cannot now dispute that Knapp's speaking at the April 6, 1981 board meeting was protected speech.

They have taken the extraordinary step of ignoring this event in their statement of the case. A review of the Court decisions and the factual circumstances of this case show that the Defendants simply lost on the credibility of their factual position at trial, in post-trial motions and appeal. This law applied by the courts below is correct and no reason exists for this Court to relitigate the issues presented below.

II

THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY FINDING THAT THE REASONS OFFERED BY THE DEFENDANTS FOR ADVERSE PERSONNEL DECISIONS WERE PRETEXTUAL

The Defendants assert that their was insufficient evidence presented to the jury to justify the finding that the reasons offered were pretextual. Both the trial court and Seventh Circuit rejected the Defendants' position. (A31-A33)

As noted by the Seventh Circuit, the test to be applied is not whether evidence exists in the record that supports the Defendants' position. Rather, the question is whether evidence exists from which the jury could reasonably reach the conclusion it did.

The Seventh Circuit's determination is fully consistent with Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977). See also, Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979)

The Defendants' challenge to the factual basis for the jury's findings is frivolous. As stated by the Seventh Circuit:

> "Because there exists a more than reasonable basis in the record to support a finding that Knapp's constitutionally protected speech caused the Defendants' actions, we uphold the jury verdict. See Crawford v. Garnier, 719 F.2d 1317, 1322-23 (7th Cir. 1983)"

Appellants' defense was that the actions which they took in (1) giving Terry Knapp two bad evaluations; (2) firing him from his coaching position; (3) transferring him from Woodruff High School to Harrison Grade School; and (4) denying him a personal leave day, were taken for legitimate, non-discriminatory reasons was completely discredited at trial.

Appellants' appeal on this issue is simply an effort to attack the findings of fact by both courts and the jury, findings which were thoroughly supported by the record.

A. Denial of personal leave day.

At the trial, Appellants contended that Knapp was denied his personal leave day request to see a lawyer because it did not involve a court date or a hearing. In response to this asserted reason, Plaintiff established that:

1. Board policy requires that personal leave days shall be granted for urgent and compelling reasons.

2. Defendants knew Knapp had a compelling reason for requesting the personal day, i.e., the need to see a lawyer about his constitutional rights and his job security, as well as his right to speak at a board meeting.

3. A specific example of an urgent and compelling reason under board administrative procedures was for legal proceedings and/or transactions. There was no requirement that a court date was a prerequisite.

4. The request was made in accordance with the board policies and procedures requiring two-day notice.

5. Other teachers at Woodruff High School had been granted personal leave days under the same policies and procedures in order to see attorneys for consultations which did not involve court dates.

6. Other teachers at Woodruff High School had been granted personal leave days under the

same policies for reasons less compelling than that requested by Knapp including one on the same day Knapp requested leave.

7. Burdette testified that he did not consider Knapp's request for a personal leave day urgent and compelling since there was no need for Knapp to speak at the board meeting on April 6, 1981, demonstrating that the reason for denial was to prevent Knapp from speaking.

B. Loss of coaching position.

On June 15, 1981, Defendant McDavid fired Knapp from his coaching position allegedly because he was unavailable to teach in the summer program and might not be available the following year. Knapp testified that he would be available during the following season, and so informed McDavid.

Plaintiff established that:

1. The decision to fire Knapp from coaching was discussed by all of the Defendants prior to June 15, 1981, although this is normally a decision made exclusively by the principal.

2. Burdette informed McDavid that because of all the trouble Knapp was causing the administration he should be fired from coaching, and also stated that because of Knapp's refusal to accept the administration's position on mileage reimbursement he should be fired from coaching.

3. Whitaker, on April 1, told Knapp he should quit coaching if he couldn't accept the policies of the administration on mileage reimbursement and liability insurance.

4. McDavid stated Knapp was fired was because he was uncooperative with administration officials, which referred specifically to Knapp's efforts to change the mileage and liability reimbursement policies in the District.

5. Defendants did not inform Knapp of all of their reasons for firing him from coaching at the time the firing took place but rather shifted and changed their reasons numerous times as each reason was exposed as a sham.

In response to the defense that Knapp could not coach because he was unable to work in the summer program, Knapp showed that:

1. Coaching in the summer program was not a condition of employment for baseball coaches.

2. Very few baseball coaches other than Knapp had ever coached in the summer baseball program.

3. Coaching in the summer baseball program was completely voluntary and unpaid.

4. The person hired to replace Knapp after he was discharged did not coach in the summer baseball program or assume any other off-season coaching functions.

5. Defendants did not present any other coach who had ever been fired for not coaching in the summer baseball program other than Knapp.

After Knapp was fired and after he had filed suit in Federal District Court, Defendants' attorney, in a newspaper article, publicly stated that Knapp was fired because he was a "poor coach". This was the first time that Knapp had ever received any criticism of his coaching at any time.

Plaintiff introduced evidence to show that Knapp was an outstanding coach, highly respected by his fellow coaches, parents, and students, who devoted hundreds of unpaid hours both to the school and community in coaching endeavors, and who had started new and innovative programs at Woodruff High School and at every other high school where he had coached.

Defendants then shifted their defense and asserted that Knapp was unreliable.

Plaintiff established that:

1. Knapp had been ill one day in 14 years of teaching.

2. Another coach who had missed most of his season because of illness was not discharged from coaching, but rather was retained and fully paid for his position, both the year he was ill and the following year when he was still unavailable to coach.

The second reason was that Knapp was suffering from a physical disability caused by his coaching duties.

Plaintiff established that:

1. The phlebitis condition from which he suffered was not permanently disabling, was completely cured and unlikely to reoccur, and that Knapp was released for work as of August 1, 1981, eight months before the start of the baseball season.

2. The only treatment required was the wearing of a support sock.

3. Knapp coached several sports during the same season in which he would have been coaching baseball had he not been fired.

4. Appellants introduced no medical testimony of any kind to support their contention.

5. No coach other than Knapp had ever been removed due to illness.

Another reason asserted was that Knapp had a losing record.

Knapp established that:

1. Every baseball coach since 1977, when Knapp

began coaching at Woodruff High School, including the varsity coach, had a losing record, and all coaches had worse overall records than Knapp and were not fired.

2. Winning and losing were not criteria for judging the performance of a baseball coach at a freshman/sophomore level, but that the teaching of fundamentals was the important criteria, and in this area Knapp was an outstanding coach.

3. Numerous coaches throughout the District, both at Woodruff High School and other high schools, had losing records and were not fired.

4. Knapp's record the year he was fired from coaching was a 100 percent improvement over the record for the same team the previous year and the coach who had coached that team had not been fired.

5. McDavid had not checked the win-loss records of any coaches other than Terry Knapp the year that he was fired.

McDavid also asserted that Knapp was uncooperative with administration officials. Plaintiff established that:

1. Knapp had an excellent working relationship with his head coach and fellow coaches.

2. He donated hundreds of unpaid hours to the athletic programs at Woodruff High School.

3. He established school-wide conditioning programs, both for his baseball team as well as the other school athletes, and donated his own time in running these programs.

4. He worked during the summer in programs which he established on an unpaid basis rather than seeking private employment as most of the other coaches did.

5. Defendants failed to introduce any evidence to support their contention that Knapp was uncooperative other than as it pertained to his constitutionally protected conduct.

C. The negative evaluations.

The April 29, 1981, evaluation contained numerous generalizations which were non-factual in nature and which criticized Knapp's overall performance as a teacher.

Language in the 1981 evaluation related directly to Knapp's constitutionally protected conduct and is direct evidence that Knapp's protected conduct was a substantial motivating factor in the evaluation. With respect to the other assertions in the evaluation, Plaintiff established that:

1. Knapp's 1981 evaluation was an unscheduled formal evaluation.

2. Defendants, in Knapp's case, failed to follow its own Board policies and procedures concerning formal evaluations.

3. No classroom observation was made as is normally required by board policy and procedure.

4. None of the alleged performance deficiencies were discussed with Knapp either before or after the evaluation, contrary to normal practice.

5. Other teachers with performance problems had these problems discussed with them prior to any mention made in their evaluations.

6. Other teachers were treated differently than Knapp in that they were specifically warned about the conduct for which Knapp was criticized, and yet no mention was placed in their evaluations.

7. One other teacher who was engaging in the conduct for which Knapp was criticized was warned to be careful "at this time", referring to the spring of 1981, and was informed by Defendant Hatton that the conduct in question was not serious.

8. Another teacher was informed by McDavid, shortly before Knapp received his evaluation, that they (referring to the administration) were going to "fix" people who disagreed with the ways the administration was doing things, or words to that effect, including arranging for involuntary transfers.

9. Defendants failed to cite, during the 1980-81 school year, a single incident of alleged

misconduct by Knapp before April 1, 1981, when he was first threatened by Whitaker and when the conspiracy against Knapp began because of his protected conduct.

10. Burdette, Whitaker, Hatton, and McDavid and the School District's attorney all cooperated, contributed and conspired to produce the 1981 evaluation, contrary to normal practices in drafting teachers evaluations which are normally done solely by the evaluator;

11. Defendants' counsel was contacted the day after Knapp made his public statement to the Board and asked to draft language for the evaluation which was an unprecedented act;

12. The decision to give Knapp a critical and formal evaluation which placed him in remediation was made after April 1, 1981, which coincided with his efforts to speak publicly at the Board meeting.

13. There was no change in Knapp's performance compared to the previous school year when no such criticisms were made;

14. Knapp spent many hours giving students personalized attention and counseling students both academically and personally;

15. Knapp was regarded as an outstanding teacher by students having been selected on two occasions "Teacher of the Year" at Woodruff High School which was unprecedented, and one of the years he was selected was in 1982 when he received a second critical evaluation from Defendant Hatton;

16. The language in the 1982 evaluation concerning his lawsuit had nothing to do with his teaching performance and was prejudicial and directly related to his attempts to protect his First Amendment rights;

17. Defendants failed to follow any of its own evaluation procedures in both 1981 and 1982, although such procedures are mandated by Board policy for the evaluation of certificated personnel;

18. In the 1980-81 school year, Knapp established the Senior of the Year award resulting in over $2,100 being awarded to seniors.

D. The transfer to Harrison Grade School.

Plaintiff established that the criteria for involuntary transfers was not seniority, and that Knapp would not have been transferred from Woodruff High School had he retained his position as assistant baseball coach. Defendants' assertion that seniority was the criteria by which transfers were determined at Woodruff High School was directly contradicted by their own response to Plaintiff's Request to Admit and by overwhelming evidence presented at the hearing.

Plaintiff established that:

1. Statements were made by Whitaker to the press and admitted in Plaintiff's Exhibit No.

61(a) that seniority was not the criteria utilized at Woodruff High School and that coaches with less seniority were retained.

2. In May, 1981, immediately after Knapp's public speech to the School Board, and during the time that Plaintiff was engaging in his constitutionally protected conduct, McDavid was attempting to find a way to transfer Knapp from Woodruff High School.

3. McDavid could have, but did not, reinstate Knapp to his coaching position in the fall of 1981, which would have prevented his transfer from Woodruff High School under the existing criteria.

4. McDavid's failure to reinstate Knapp to his coaching position in the fall of 1981, when he was physically able to resume his duties, was detrimental to the athletic program at the school since no other coaches assumed the conditioning programs that Knapp had instituted and run at the program.

5. McDavid was aware as early as December of 1982, that involuntary transfers would be required and yet he failed to reinstate Knapp to his coaching position notwithstanding the unavailability of Knapp's replacement to coach during the summer, the reason for which Knapp assertedly had been discharged.

Plaintiff also established that Knapp's transfer to Harrison Grade School as opposed to other high schools where openings were available was a specific punishment designed to retaliate against him because of his

constitutionally protected conduct. In this regard, Plaintiff presented evidence that:

1. Knapp requested and was denied an interview for high school teaching positions at Peoria Central High School for which he was qualified.

2. These positions were given to teachers who had been dismissed by the School District, rather than to Terry Knapp, a tenured qualified teacher with more seniority.

3. Whitaker and Burdette specifically made the decision that Knapp would be assigned to Harrison Grade School as opposed to another school contrary to the normal practice of allowing principals to interview and select who they want.

4. The principal at Harrison Grade School did not request Knapp and did not know why he was being transferred there, contrary to normal practice.

5. The teacher Terry Knapp replaced at Harrison Grade School was later rehired and transferred to another school rather than reassigned to Harrison Grade School which would have resulted in Knapp being transferred to a different school.

6. Knapp was not given the opportunity to interview for any jobs other than Harrison Grade School despite the fact that he was regarded as an excellent classroom teacher and an outstanding coach.

7. Whitaker had a practice of punishing teachers who made trouble for the administration or who spoke out against the administration by putting them in less desirable or unwanted schools such as Harrison.

8. An assignment to Harrison Grade School was considered as a punishment to teachers.

Defendants-Appellants' contention that their legitimate non-discriminatory reason for their actions were never rebutted is patently false and totally discredited.

III

DEFENDANTS-APPELLANTS LACK STANDING TO CHALLENGE THE REMITTITUR OF THE JURY VERDICT BY THE SEVENTH CIRCUIT

The most novel contention of the Defendants-Appellants is that the remittitur by the Seventh Circuit somehow prejudiced their rights to a jury trial. The jury awarded Plaintiff $514,333. No prejudice or irregularity in the deliberations is alleged or shown. If the Defendants wish to have the amount of the verdict set by a jury, that is what the verdict should be.

As noted in Wright & Miller at §2815, page 104:

> "A final theory is that the jury by its excessive verdict intended to award the maximum and defendants cannot complain of any judgment within the permissible limits. This theory permits reduction only to the highest amount that the jury could properly have awarded. This is the only theory that has any reasonable claim of being consistent with the Seventh Amendment."

A number of cases discuss the rationale for this rule including U.S. v. 1160.96 Acres in Holmos County, Mississippi, 432 F.2d 910, (5th Cir. 1970); Gorsalitz v. Olin Mathieson Chem. Corp., 429 F.2d 1033 (5th Cir. 1970); and Glazer v. Glazer, 278 F.Supp. 476 (D.C. La. 1968) which has a thorough review of the earlier cases and of the legal considerations.

We question whether the Seventh Circuit should have ordered a remittitur of the jury verdict. However, the procedure utilized in remanding to the trial court with direction to make a final determination is certainly consistent with the basic principal that if a remittitur is directed, the trial judge who heard the evidence is in the best position to make the ultimate determination of the amount of the remittitur. See U.S. v. Bruscino, 687

F.2d 938 (7th Cir. 1982) and see also Natco Inc. v. Williams Bros. Engineering Co. 489 F.2d 639 (5th Cir. 1974).

If the Court of Appeals is to be allowed the discretion to make remittiturs of an award of general damages, it must have the flexibility to tailor the remittitur to the facts of a particular case. Further, it is logical and consistent for the Court of Appeals to utilize the expertise and experience of the trial judge in the process. The size of the remittitur is an insufficient basis to challenge the award.

Even the Defendants-Appellants, who otherwise have been totally recalcitrant in their course of dealing with the Plaintiff, have provided a logical rationale for the remand.

> "The Court of Appeals' likely motivation in remanding with instruction, i.e. to salvage the jury verdict below, to lessen expense of more litigation, to shorten that litigation and to give Plaintiff the benefit of a substantial part of that verdict (albeit decidedly excessive) is a worthy and understandable one. But on this record no mathematical basis or even close approximation is possible . . ." (Defendants-Appellants' brief at 56-57)

Trial courts have to make difficult decisions without precise guidelines. If the remittitur was proper, the Seventh Circuit's remand procedures are both logical and consistent with legal precedent. In Abernathy v. Superior Hardwoods, 704 F.2d 963 (7th Cir. 1983), the trial court there was given discretion in determining the "per diem" and the discount rate.

Contrary to the Defendant-Appellants, we believe there was ample basis in the argument and evidence to guide the jury in its deliberation. The jury was given an instruction which set forth the parameters for making an award of intangible damages. (B7) They were specifically instructed not to speculate as to damages at the request of Defendants-Appellants counsel. (B8) Further, Plaintiff's counsel requested in closing argument $1,000,000 in compensatory damages, which set the parameters for the jury's deliberations. The Defendants knew what was being sought and argued their own position on the damage issue to the jury.

The jury heard evidence of the following damages:

Terry Knapp's injury included loss of his personal and professional reputation, standing in the community as well as mental distress and medical injury.

Plaintiff established the written comments contained in the April 1, 1981, memorandum to Board members and administrators, the 1981 and 1982 evaluations, and the written reprimand, documents which were prepared, promulgated, and/or approved by Defendants, are available to all supervisory personnel within the School District who had any authority for the promotion, hiring, transfer, and personnel decisions affecting teachers within District 150. Further, the false statement made by defense counsel, which was later abandoned at trial, that Knapp was fired for being a "poor coach" was published in the only major newspaper for the metropolitan area of Peoria.

Plaintiff was a well-known and highly respected teacher and coach in the metropolitan area, a life-long resident of the Peoria community with extensive contacts and exposure both professionally and personally

within the coaching community, within the teaching community, and among parents and students in the Peoria and surrounding area. His academic and coaching credentials were umblemished, having never received a negative evaluation or any criticism concerning his coaching prior to the commencement of Defendants' actions on April 1, 1981. The testimony of William Reising, a school superintendent from another School District called as an expert witness on the issue of the damage to Knapp's professional career opportunities, demonstrated that, because of Defendants' actions, Knapp would have no chance of obtaining employment in other School Districts. Knapp would never be interviewed for a job in another School District as a result of Defendants' actions, and Knapp's efforts to protect his constitutional rights. In spite of his excellent qualifications, both as a teacher and a coach, any chance for advancement or other employment were destroyed since Knapp would be branded as a troublemaker by administrators. Criticism

directed toward a teacher such as that given to Knapp by Defendants, or which indicates that a teacher is in any way a troublemaker, virtually destroys the teacher's career opportunities. Testimony established that Whitaker and Burdette informed Knapp that he was not interviewed by any principals in the School District during the spring of 1982, despite his excellent qualifications because no principal wanted him or would have him in their school. In fact, Knapp, at the time he was involuntarily transferred, was not interviewed by any principal in the District despite specific requests for interviews at any school and despite qualifications which would normally make him highly in demand by any principal within the School District. In short, there is substantial evidence to support damage to Knapp's reputation, both as a coach and a teacher, and damage to any career opportunities either within or without the Peoria School District. Finally, Knapp was transferred to a school which was regarded as a place of punishment in the District. He is still there and has not coached since June of 1981.

Knapp spent over 20 years either preparing to be or being a teacher. He obtained both a Specialist and a Masters Degree in educational administration over and above his teaching credentials. Over half of his life has been spent dedicated to a profession whose future has now been devastated by the Defendants' actions. In Alioto v. Cowles Communications, Inc., 430 F. Supp. 1363 (Northern District, California, 1977), affirmed 623 F 2d 616 (9th Circ., 1980), the former mayor of San Francisco, Mayor Alioto, received general damages in the amount of $350,000 from a jury which was affirmed on appeal for a libelous article which suggested that the former mayor was linked to the Mafia. These general damages of $350,000 included loss of reputation, shame, mortification, and hurt feelings, according to the Court. These damages were all deemed to be compensatory and not punitive damages. See also Gertz v. Welch, 680 F. 2nd 527 (7th Cir., 1982).

Terry Knapp also established that he suffered severe emotional and medical injury from the actions of Defendants.

Knapp, his fellow teachers, and two of his treating physicians, Dr. Lawless and Dr. Montgomery, testified that he endured physical pain and suffering as a result of Defendants' actions, including, among other things, vomiting, nausea, severe stomach cramps, dry heaves, chest pains, dizziness, sensations of heart attacks, and aggravation of his existing phlebitis condition. He was required to take medication, undergo hospital tests for his stomach problems, and was under his doctor's care for these problems for over a five-month period of time.

Knapp was also under the continuing care of a psychologist for almost six months as a direct result of Defendants' actions, and at the time of the trial was still seeing a psychologist on a less frequent basis. The psychologist and Knapp both testified that he had experienced severe mental anguish and suffering, nervousness, anxiety, depression, frustration, difficulty sleeping, difficulty interacting with his wife and children, inability to concentrate, obsession with the

pain he was experiencing, and other psychological and emotional trauma as a direct result of Defendants' actions. Knapp, who had never missed a school day during his entire period of employment with District 150 due to illness, missed 27 1/2 school days as a direct result of illnesses caused by Defendants' actions.

The severe and substantial nature of Knapp's emotional and physical anguish was also established by a psychiatrist called as an expert witness by Plaintiff. Unrebutted testimony established that, because of Knapp's dedication and commitment to his profession, his standards of excellence which he had set both for himself and his students, and his psychological makeup, Defendants' actions, which were designed to destroy him as a teacher and a coach, were severely damaging to Knapp. The testimony established that Knapp's background, experiences, and unusual commitment to his profession made him particularly vulnerable to Defendants' illegal actions and caused him great emotional and psychological damage. Knapp could only

escape the tremendous mental and emotional pain and the harassment by giving up what was his life's work.

Compensation for physical, mental, and emotional suffering has been recognized in other cases and large verdicts have been upheld even where, unlike here, these are the only elements of damage proved in the case.

In Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981), a review Court upheld a damage award in a 1983 case which awarded Plaintiff $300,000 in compensatory damages to a pregnant Indian woman who had been kicked in the stomach by police, denied medical attention, arrested and jailed, and later gave birth to a stillborn child. The 8th Circuit affirmed the jury's award of $300,000 in compensatory damages noting that the damages reflected physical pain and suffering which continued for some time after the injury, emotional trauma, and the indignity of being denied her civil rights. The cumulative effect of these factors justified the award of $300,000 to the Plaintiff.

In Moser v. Texas Trailer Corp. 623 F 2d 1006 (5th Cir. 1980), the 5th Circuit Court of Appeals affirmed in part and reversed in part the lower Court order, upheld the jury award of $511,000 for pain and mental anguish. This amount of more than half a million dollars was separate and apart from the award to the Plaintiff for lost earnings and medical expenses.

Here the Plaintiff suffered physical injuries, as well as emotional problems. See also Spears v. Conlisk, 400 F. Supp. 490 (1977).

The remittitur prejudices the Plaintiff-Appellee, not the Defendant-Appellants. If improper, the relief should be reinstatement of the verdict, not that sought by Defendants-Appellants.

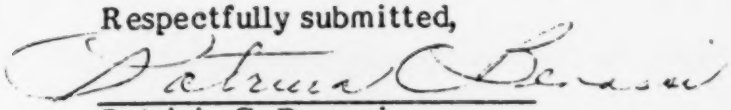
The Defendants-Appellants lack standing to challenge the verdict reduction and this Court has no basis to assert jurisdiction over the remand procedures mandated by the Seventh Circuit. The procedure upon remand to the trial court neither raises a legitimate federal question, nor prejudices the Defendants-

Appellants. The argument of Defendants-Appellants do not present a basis for the exercise of this Court's jurisdiction.

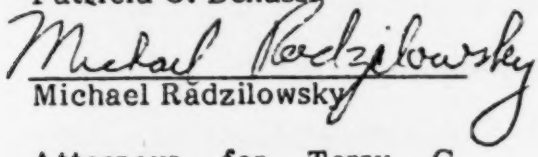
SUMMARY

For the foregoing reasons, we respectfully request that the Appeal be dismissed or the Judgment of the united States Court of Appeals for the Seventh Circuit be affirmed. Alternately, we respectfully request that the Appeal be treated as a petition for certiorari and be denied.

Respectfully submitted,



Patricia C. Benassi



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APPENDIX B

Instruction No. 11

The plaintiff claims that he spoke to school board members concerning school matters and his employment as a teacher and coach, and that such conduct was a substantial motivating factor in the school's decision not to rehire him as assistant baseball coach, refusing him permission for a personal day off with pay, giving plaintiff negative written performance evaluations, monitoring his conduct, and transferring him from Woodruff High School to Harrison Grade School.

The defendants admit that he was removed as an assistant baseball coach at Woodruff High School, that he was refused a personal day off with pay, that he was given a negative evaluation and that he was transferred from Woodruff High School to Harrison Grade School.

The defendants deny that plaintiff's speeches or conversations to and with school board members were a motivating factor in the decision to remove him as assistant baseball coach, the refusal of a personal day with pay, a negative evaluation or evaluations, or his

transfer from Woodruff High School to Harrison Grade School. The defendants further deny that they monitored plaintiff's conduct.

The defendants' claims that there were legitimate, non-discriminatory reasons for the decisions to remove plaintiff as assistant baseball coach, to refuse him a personal day off with pay, to give him a negative evaluation and to transfer him from Woodruff High School to Harrison Grade School.

The plaintiff claims that the reasons given by defendant for denying him a personal leave day with pay, for giving him negative evaluations on April 29, 1981 and April 29, 1982, for monitoring his activities, for removing him as assistant baseball coach and for involuntarily transferring him from Woodruff High School to Harrison Grade School, were not the true reasons for defendants' actions against plaintiff, but rather were a pretext. Plaintiff claims that the above actions would not have been taken aginst him but for his constitutionally protected conduct.

Instruction No. 12

You are directed to answer the following two-part special interrogatory:

1. Was the Plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendant's decision to transfer plaintiff to Harrison School?

ANSWER: Yes (Yes or No)

If your answer to question number 1 is "Yes" then, please answer question number 2 which is as follows:

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?

ANSWER: No (Yes or No)

JURORS:

/s/ _____
/s/ _____
/s/ _____
/s/ _____
/s/ _____
/s/ _____

Instruction No. 13

You are directed to answer the following two-part special interrogatory:

1. Was the Plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to deny plaintiff a personal leave day with pay?

ANSWER: Yes (Yes or No)

If your answer to question number 1 is "Yes" then, please answer question number 2 which is as follows:

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?

ANSWER: No (Yes or No)

JURORS:

/s/ _____
/s/ _____
/s/ _____
/s/ _____
/s/ _____
/s/ _____

Instruction No. 14

You are directed to answer the following two-part special interrogatory:

1. Was the Plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to give plaintiff negative evaluations?

ANSWER: Yes (Yes or No)

If your answer to question number 1 is "Yes" then, please answer question number 2 which is as follows:

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?

ANSWER: No (Yes or No)

JURORS:

/s/ _____
/s/ _____
/s/ _____
/s/ _____
/s/ _____
/s/ _____

Instruction No. 15

You are directed to answer the following two-part special interrogatory:

1. Was the Plaintiff's constitutionally protected conduct a substantial or motivating factor in the defendants' decision to remove him as assistant baseball coach?

ANSWER: Yes (Yes or No)

If your answer to question number 1 is "Yes" then, please answer question number 2 which is as follows:

2. Would the defendants have taken the same action even if the plaintiff had not engaged in constitutionally protected conduct?

ANSWER: No (Yes or No)

JURORS:

/s/ _____
/s/ _____
/s/ _____
/s/ _____
/s/ _____
/s/ _____

Instruction No. 16

The law permits damages for the deprivation of a constitutional right even if no actual out-of-pocket damages occurred. On the question of damages, it will be necessary to come to some figure that is fairly calculated to compensate Terry Knapp for the deprivation of his rights, such as:

(a) The nature and extent and duration of the deprivation;

(b) The mental, emotional, and physical anguish and suffering experience as a result of the deprivation;

(c) Loss of reputation, standing and respect both personally and professionally as a result of the defendants' actions against Terry Knapp;

(d) Loss of other employment opportunities, opportunities for advancement, promotion or transfer as a result of the defendants' actions taken against Terry Knapp;

(e) Actual financial loss from loss of coaching position.

Whether any of these elements of damages have been proved is for you to determine.

Instruction No. 17

In fixing the amount of your award you may not include in or add to an otherwise just award of actual damages any sum for the purpose of punishing the defendants, or to serve as an example or warning for others.

speech with respect to Mr. Knapp's communication with members concerning his personal problems — and they said it was "personal problems," they said he was a pest — that is not protected speech.

MR. RADZILOWSKY: I just have two remarks. First of all —

THE COURT: Better be quick.

MR. RADZILOWSKY: You have to call a member to get sponsorship to speak to the board. The only thing he did after — first he called Glover and Marilyn Ketay for sponsorship. The second — which is not presented her — whether the board of education could develop a policy that would limit individual contacts with them as individuals. And that is a more difficult question than the ones presented here. But they don't have the policy, and they do exactly the opposite, and Harry Whitaker can't make a policy for them. It is as simple as that.

THE COURT: I apologize for what I am about to say rambles somewhat. There have been various points raised concerning this issue, and I have not had the opportunity to really sit down and collect my thoughts based on the arguments that have been made. I would indicate that I will almost certainly supplement these oral comments with a written document.

The question of free speech is one that has troubled me. That has been a problem throughout the entire history of this country in one context or another, whether you are talking about obscenity, or war demonstrators, or teachers or any other type of public employees. There are a thousand different examples, and they are difficult because they inevitably involve a balance of individual interests as opposed to some other concerns, whether it is the rights of society generally or legitimate interests of a certain particular group. My own perception of this situation is this: we have in this case a public employee. There is no question that a private citizen could contact a board member at home

or over the phone or at a board meeting and express their concern, whether they are personal concerns or whether they are "general interest." And I might add that I'm not real sure at this point after listening to all this testimony how to exactly characterize these concerns. The best way that I have been able to come up with — at least in terms of the major ones — the mileage and the liability insurance — my best description of them is a matter that does have an impact on a number of people which has been raised by the particular individual because of its application to him.

Now, that probably makes it a hybrid of some sort. I don't know. There are other things that have been discussed that perhaps more clearly could be labeled "personal" and other matters which could be labeled more properly as "public" or "general interest matter." My perception of the law is that when a public employee is attempting to exercise free speech — exercise something that falls under the area of free

speech — that it is encumbent upon the employer to establish that the regulation — admittedly we are not really necessarily talking about prohibition — that there is a reason for the regulation, that it is a legitimate regulation and it is legitimately applied to this particular person. There is no question in my mind that in some way the Peoria Board of Education could formulate personal rules, could be contained within the teacher's job description or in any other fashion, could formulate proper constitutional regulations that limit the contact or the nature and the form of the contact that a teacher has with a school board. There are all sorts of reasons for that. Some of them have been expressed in this trial.

I don't believe that they did that in this case, and I don't believe that it was done, from what I have heard — I don't believe that the rule in the form that it does exist — was intended to deviously avoid that issue. I just don't think it was done. But the rule, as it exists, only exists in the superintendent's job description, and

what it says is, as part of his several duties: 'communicate or cause to be communicated to all employees all actions of the board relating to the several employees and all communications made to the board shall be through him'.

I feel that it is absolutely critical when there is an effort made to either establish or to use a regulation or apply a regulation to an employee, a public employee, that regulation be clear, that it be concise, that it give them some prior notice of the fact of what is expected of them, even in terms of what they are expected to do or not to do. If such a regulation did appear in a job description of the teacher or in the personnel rules, in my opinion whether or not a particular teacher had taken the time to read that rule or not is a different question. But based on my perception of this case, I don't believe — first of all, I believe it was encumbent upon the school district to formulate a clear and concise rule which had a legitimate purpose for its existence. I don't believe that Item No. 11 under the 'job description of the superintendent of schools' fits that bill.

Secondly, more specifically, even if I had determined that this was a — in the general sense a reasonable regulation in other respects, I think there are serious problems with this wording in terms of its vagueness, which is one of the tests that is considered in many of the cases involving this type of regulation. What it says is, 'And all communications made to the board shall be through him.' That wording in no way distinguishes between oral communications and written communications. It in no way distinguishes between matters of 'personal concern' and matters that may have more of a general interest either to the board or to the public generally. It doesn't even establish a procedure or allow for a procedure, as I read it, that would necessarily allow a teacher to contact a school member about speaking at a board meeting without doing that through the superintendent's office, even if there was no discussion about what the content of the presentation was going to be.

The bottom line is I just simply believe that it does not fit the bill in terms of establishing a reasonable guideline that someone — and unfortunately — today more often than not ends up being in court deciding whether or not it is a reasonable regulation or not. But this Item No. 11 simply does not do that.

As to the question raised by Mr. Cannell concerning to what extent can a board member say to someone, 'I don't want you to bother me, you're bothering me, leave me alone,' that is somewhat of a different question. It is an interesting question. I'm not sure that it controls in this situation. And that is the basis for this lawsuit.

There is no indication in this case that any of these people whom he contacted ever said to him directly, 'I don't want you to call me anymore' or 'I don't want you to come over to my house,' or anything like that. I guess perhaps a follow-up question would be to what extent must a school board member take it upon himself or herself to indicate that they don't want

contact? But in any event, I don't believe that question, however it was resolved, controls the facts in this case.

Actually, after listening to the testimony, I was a little -- I was still unsure as to exactly what the position of the defendants was as to what would not be protected and what would be. For a period of time during the trial I thought that the defendant was going to argue that the only application of this rule concerned written communications and that there wasn't any rule that regulated or prohibited oral communication. I'm not sure of that now. And I think it is just another example -- through no fault of counsel. I think counsel has done an excellent job of presenting the position of the school district -- but I think whenever a Court, after listening to lengthy testimony at a trial such as this, still has that substantial question in my mind as to what the parameters of this written regulation are. I think it makes it easy for me to say that this regulation has to fall in the terms of acting as a legitimate regulation after that. Because I have already ruled for the reason

stated that I do believe that the regulations were fatally defective and that the contact with the board members are protected speech, I don't believe that it is necessary for me to go to the question of the discriminatory application to this plaintiff. I think that is a much more — it would be much more difficult for the Court even to make a decision on that.

You have substantial issues of fact involved in that that are capable of a variety of interpretations. But I do feel that for all the reasons stated and for others that I will enumerate in the written order that the speech involved in this case, the contact with the board member orally, I mean over the phone in their homes, at the board meeting, which is already admitted and even the transmittal to them of written documents is protected speech.

Now, I want to make a comment here. I don't know that anyone was even going to raise this, but it is something that popped into my mind, and I want to indicate something about it now. I do think the question

concerning the evaluation — and it would — by that I — the result of that does flow to the oral reprimand, the written reprimands, the memorandum to the board and the inclusion in the job description of the wording concerning the evaluation. There is a little bit of a related issue that has to do with one of these evaluations that I don't know whether either side is going to raise it, but I'm going to lay it to rest right now. Part of the 1981 evaluation had to do with the — with Knapp's bringing the cake and the doughnuts to the school and putting it in the class and discussing it with the teachers. If the argument is made that that was protected speech and it was consequently not properly included in the job evaluation, I don't accept that argument. I think you have a very different situation there. I think the issues are extremely different from what we are faced with here. I don't know. You may not have intended to make that argument anyway.

MR. RADZILOWSKY: I wasn't talking about the speech, I wasn't talking about protected speech, just the

incident itself . . . did not testify it being placed in the reprimand. In my view that's more of a shifting — that's a jury question.

Community Relations - Board Policy

Article I 1100.00

SCHOOL-COMMUNITY RELATIONS

Responsibility for the public education of its youth is the heaviest charge laid upon any community. The Peoria Board of Education, which acts as the trustee of the people of District 150, Peoria Public Schools in discharging this obligation, is mindful of its responsibility to the individual child and to the society in general.

In order to develop and maintain a program for instruction for the Peoria Public Schools which is consonant with the considered opinions of the citizens of Peoria, members and employees of the Peoria Board of Education shall maintain channels of communications with such citizens at all times.

The Board shall communicate through available media, information relating to the plans, programs, problems, and operations of the Peoria Public Schools.

The Board shall encourage participation on the part of the public at the regular meetings of the Peoria Board of Education.

The Board shall maintain an atmosphere which makes two-way communication between the Board, administration, faculty, parents, students, and the public in general a vital force in the continuing improvement of the Peoria Public Schools.

The Board shall conduct a continuing effort to ascertain public attitudes about the schools and their programs and convey constructive suggestions or consideration in the planning of policies and procedures.

The Board shall impress on every employee of the Peoria Public Schools, his or her role in the improvement of communications between the schools and the public, including reporting to proper officials the attitudes, responses, and actions of groups or persons toward the Peoria Public Schools and programs.

A continuing program of inservice training shall be offered for employees in school-community relations.

Adopted: November 27, 1978

Community Relations - Board Policy

Article 1 1120.10

ADDRESSING THE BOARD OF EDUCATION

1. The Board of Education is not a forum; it is a deliberative body. Accordingly, it receives communications, both oral and written, as a medium of information. It does not debate the contents of such communication but considers them in making decisions and in the establishment of policies.

2. Following the adoption of the minutes, the President of the Board will recognize members of the audience who wish to speak on Action Items. Not more than five minutes may be allotted to each speaker and no more than twenty minutes to each subject under discussion, except with unanimous consent of the Board.

3. Any person may communicate with the Board in writing on any school related subject. Upon request to a Board member prior to the board meeting and with the consent of the majority of the Board, an individual may address the Board at a designated time for no more than five minutes with further time allotted as appropriate, at the discretion of the chair and with the concurrence of the majority of the Board. Total time on any one subject shall exceed twenty minutes only at the discretion of the chair and with the concurrence of the majority of the Board.

4. Questions are to be directed to the Board of Education as a whole and may not be put to any individual member of the Board or administrative staff.

5. It shall be in order for Board members to interrupt a speaker at any time to ask questions or make comments as frequently as necessary to clarify the discussion.

6. The Board may attempt to answer questions regarding items on which they have reached a decision.

7. The Board will not answer questions involving litigation, possible litigation, or negotiations.

8. No person less than eighteen years of age may address the Board in meeting unless accompanied by his parent, guardian or teacher, except with unanimous consent of the Board.

9. Because all public meetings of the Board of Education are made a matter of public record, each speaker, when recognized by the President, shall give his name and address and announce the general subject matter before presenting his views.

10. No person shall present orally or discuss at any meeting of the Board of Education, charges or complaints against individual employees of District 150. Such charges or complaints shall be presented to the Board in writing and shall be signed by the person or persons making the charges or complaint. Generally, the Board will refer such charges or complaints to the Superintendent for investigation.

11. Boisterous conduct shall not be permitted at any meeting of the Board of Education, nor will any defamatory of abusive remarks be tolerated. The President may terminate the privilege of address of any speaker who violates this regulation.

Revised: December 1, 1980

Administration - Board Policy

Article 2 2111.10

SUPERINTENDENT OF SCHOOLS

Appointment:

The Board of Education shall appoint a Superintendent not later than the first regular meeting in January for a period not to exceed three years.

Primary Function:

The Superintendent of Schools, to effectively discharge his duties as such, shall be vested with the necessary powers. He shall have complete administrative authority over the school system and shall be responsible for the efficient operation of the system in all its divisions.

Supervise and coordinate the work of:

1. Associate Superintendent
2. Assistant Superintendent, Operations & Personnel
3. Assistant Superintendent, Special Services
4. Business Manager
5. Controller
6. Director of School/Community Relations
7. Director of Reimbursable Programs and Claims
8. Staff Engineer
9. Legal Advisor

Powers and Duties:

1. Attend all meetings of the Board, shall be a member of all committees, and shall attend

all meetings of the same, except when his own appointment, efficiency, contract, or salary are being considered.

2. Advise the Board on recommendations for the educational advancement of the schools. He shall have responsibility for the formulation of school policies, plans, and programs; and otherwise prepare, or cause to be prepared, and persent facts and explanations necessary to assist the Board in its duty of legislation for the schools.

3. Keep the Board informed as to how policies are being carried out, as to the conditions and efficiency of the different services of the school system, and shall report such other matters as are pertinent to the business at hand.

4. Recommend to the Board sales of all property no longer required by the Board. He shall be responsible for ascertaining that all purchases and sales follow the Board policies covering purchases and sales.

5. Recommend for appointment, or employment, all employees of the Board, except officers of the Board, and shall assign, transfer, and recommend for dismissal any and all employees of the Board except officers of the Board. The Superintendent shall obtain a credit report upon each each employee before recommending his appointment.

6. Direct the preparation of the annual budget for its adoption by the Board and shall administer the budget as enacted by the Board, acting at all times in accordance with legal requirements and the adopted policies of the Board.

7. Maintain, or cause to be maintained, such personnel records, pupil accounting records, business records, any any other records which he, with the approval of the Board, shall consider necessary.

8. Recommend the alteration or establishment of attendance boundaries for all schools in the interest of good administration of the instructional program and shall approve the special transfer of pupils from one district to another only when, in his opinion, the conditions in each case warrant such action.

9. Represent the schools before the public and shall maintain, through cooperative leadership, both within and outside the schools, such a program of publicity and public relations as may keep the public informed as to the activities, needs, and successes of the schools.

10. See that all constitutional or statutory laws and the Peoria charter or state regulations of the Board are effectively carried out.

11. Communicate, or cause to be communicated, to all employees, all actions of the Board relating to the several employees and all communications made to the Board shall be through him.

12. Have power to make such rules and give such instructions to school employees and pupils as may be necessary to make the policy and/or rules and regulations of the Board effective; and in all matters not covered by these regulations, he shall act on his own discretion if action is necessary and shall report his

action to the Board for its information or approval.

Revised: January 23, 1978

Job Description - Teacher

PRIMARY FUNCTION: Instruct and Supervise Student

REPORTS TO: Principal

RESPONSIBILITIES:

1. Plan and implement a program of study employing instructional methods and materials tht are most appropriate for meeting District goals and objectives.

2. Create a classroom and school environment that is conducive to learning and appropriate to the maturity and interests of students.

3. Assume responsibility for the safety and well being of students under his/her direct supervision.

4. Evaluate students on a regular basis and provide progress reports as required.

5. Maintain and submit such reports and records as required.

6. Communicate with students and parents or guardians on regular basis.

7. Assist the administration in implementing all policies and/or rules governing student life and conduct and develop reasonable rules of classroom behavior and procedure, and maintain order in the classroom in a fair and just manner.

8. Maintain and improve professional competence.

9. Attend meetings and serve on committees.

10. Perform such other duties and assume other responsibilities as may be assigned by the Principal.

In addition to the above responsibilities, teachers are excpected to follow the work year as outlined annually by the Board of Education. Currently, teachers are expected to report for 181 working days.

Please be aware that the working year (181 days) for teachers is greater than the student-contact days. Due to severe weather conditions or other emergency situations, school may be cancelled for students only; teachers are expected to report for duty as usual.

_____
Signature of Teacher

_____
Date

of public funds. Moreover, Knapp's speech on this topic enlightened the public to the fact that the School District paid teachers at Peoria high schools, including Woodruff, a uniform rate of 20¢ per mile for education-related travel, while coaches at Woodruff received a much lower rate of 12¢ per mile, even though their athletic budget consisted, in large measure, of public funds. In view of the content, form, and context of Knapp's speech on inequitable mileage allowance for Woodruff coaches, we hold that, in the context of this case, such speech is a matter of public concern.

The liability insurance coverage provided by School District 150 for all coaches and volunteer parents who transport student-athletes to school-related events in their own vehicles is, likewise, a matter of interest and concern to members of the Peoria community. In today's litigious society, a volunteer who gratuitously donates time and expense in transporting students is entitled to know the risks involved and the limits of the liability insurance coverage in the event of an unfortunate accident. Similarly, the citizens of Peoria, as taxpayers, have a financial interest in the terms of the School District's insurance policy and the amount of coverage provided when the School District is held liable for an accident involving a school employee or authorized volunteer personnel. The failure to provide the citizens of Peoria with such insurance information borders upon a breach of the School District's duty to inform the community of the public school system's policies concerning potential liabilities. At trial, the defendants established that the Peoria School District is required by Illinois state law to indemnify and protect all School District employees and authorized volunteer personnel against "death and bodily injury and property damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board." *See* Ill. Rev. Stat. ch. 122 §§ 10-20.20, 10-22.34 (1983). The record reveals, however, that the defendants never in-

formed Knapp nor any members of the Peoria community of this state-mandated indemnification policy before Knapp presented the matter to the School Board. In fact, the varsity tennis coach at Woodruff submitted a formal letter of resignation due, in part, to his belief that the School District's liability insurance policy was inadequate. In view of the content, form, and context of Knapp's speech on liability insurance for coaches and volunteer parents who transport student-athletes to school-related events, we hold that such speech is a matter of public concern.

The functioning of a grievance procedure is generally an internal issue, important only to the teachers and School District employees who must use the procedure to air their complaints about employment conditions and practices. In the present case, however, the grievance procedure was the subject of ongoing collective bargaining negotiations between the teachers' union and the administrators of Peoria School District No. 150. Board member Ketay requested that teachers comment upon deficiencies in the grievance process and administrators of the School District openly sought input on the grievance procedure in order to effectively negotiate the issue with the teachers' union. In the context of this case, the grievance procedure was a legitimate matter of interest for the citizens of Peoria who, as taxpayers, had a financial stake in the settlement reached between the teachers and administrators in District 150. *See, e.g., McGill v. Board of Ed. of Pekin Elementary Sch.*, 602 F.2d 774, 778 (7th Cir. 1979). The citizens of Peoria certainly were entitled to know the information relied upon by the School District in negotiating the new collective bargaining agreement. Knapp's speech to School Board members concerning the ineffectiveness of the grievance procedure, just as his speech on the issues of inequitable mileage allowance and liability insurance, informed the Peoria community of possible shortcomings in the management policies of the School District that could very well have a direct financial impact upon the entire taxpaying commu-

nity. Thus, in view of the content, form, and context of Knapp's speech on the ineffectiveness of the grievance procedure in District 150, we hold that, in the context of this case, such speech is a matter of public concern.

In light of our conclusion that Knapp's speech involved matters of public concern, we proceed to the second analytical step—the *Pickering* balancing test—and weigh Knapp's interest, as a citizen, in discussing matters of public concern with the Peoria School Board against the School District's interest, as an employer, in promoting efficient public services by requiring that a teacher's communication to the School Board be channeled through the superintendent. The initial, and often determinative, question is whether the speech interferes with the employee's work or with the efficient and successful operation of the office. Knapp's speech clearly did not interfere with his teaching responsibilities, as Knapp continued to teach in the science department at Woodruff High School for more than a year after he spoke with the School Board members. Knapp's temporary leave of absence at the end of the 1980-81 academic year resulted from his medically documented condition of nervous anxiety and phlebitis. The record is void of any evidence suggesting that this temporary medical leave was caused by Knapp's communication with School Board members on the issues of inequitable mileage allowance, liability insurance, or the grievance procedure within District 150. Moreover, we are not presented with a case of close working relationships between teachers and administrators in District 150, where Knapp's speech caused disruption or threatened to destroy employee morale within Woodruff High School much less the Peoria School District. Knapp's speech, on behalf of other teachers, coaches, and volunteer parents, was directed at certain policies of the School District, not at any particular person with whom he had daily contact. Knapp's speech did not affect discipline within Woodruff High School nor did it endanger the daily classroom routine. Indeed, the defendants admitted at trial that "we don't have a disruption issue here."

The record further reveals that the time, place, and manner in which Knapp delivered his speech to the School Board did not interfere with his teaching responsibilities. Knapp discussed the inequitable mileage allowance, the liability insurance, and the grievance procedure issues with Board members on his own time and at a regularly scheduled School Board meeting, with the sponsorship and approval of Board members. In addition, Knapp adhered to the internal rules of Peoria School District No. 150, vocalizing his complaints through the formal grievance process. Knapp's disagreement with the administrative policies of the Peoria School District arose, in part, from his experience with the grievance procedure at Woodruff High School. We are mindful that "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." *Connick*, 461 U.S. at 153. In the present case, however, Knapp was not permitted to challenge the inequitable mileage allowance and liability insurance issues at all four levels of the grievance procedure because principal McDavid deemed them non-grievable "class actions." Knapp's only available alternative was to bring these matters of public concern to the attention of the Peoria School Board members, the elected educational policymakers for the Peoria community.

We recognize that the Peoria School District has a legitimate interest in maintaining order by channeling a teacher's communication to the School Board through the superintendent. This practice clearly prevents the Board from being overburdened with personal, job-related issues more efficiently handled at the administrative level. Nevertheless, Knapp's speech to the School Board members on the issues of inequitable mileage allowance for Woodruff coaches, liability insurance for coaches and volunteer parents, and the ineffectiveness of the grievance procedure did not hinder the educational services provided within

Woodruff High School nor did it threaten to disrupt the day-to-day administration of District 150. Thus, in the context of this case, the interest of the Peoria School District in promoting efficient educational services does not outweigh Knapp's right to discuss matters of public concern with the Peoria School Board. Accordingly, we hold that under the First Amendment analysis set forth in *Pickering* and *Connick*, Knapp's speech to the School Board concerning inequitable mileage allowance, liability insurance, and the grievance procedure are matters of public concern protected by the First Amendment to the United States Constitution.

B. SUFFICIENCY OF THE EVIDENCE

In *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977) ("*Mt. Healthy*"), the Supreme Court concluded that a public employee who alleges a violation of his First Amendment right to free speech must "show that his conduct was constitutionally protected, *and* that his conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' " for the defendant's actions. 429 U.S. at 287 (emphasis added) (footnote omitted). We have already ruled that Knapp's speech to the School Board members concerning inequitable mileage allowance, liability insurance, and the grievance procedure was, as a matter of law, constitutionally protected. Thus, Knapp satisfied the initial burden of proof under *Mt. Healthy*. We now address the defendants' argument that Knapp failed to introduce sufficient evidence to satisfy the "substantial or motivating factor" prong of the *Mt. Healthy* test.

The jury expressly found that Knapp's constituionally protected speech was a substantial or motivating factor in the defendants' decisions to deny Knapp a personal leave day with pay, to give Knapp negative evaluations, to remove Knapp as the assistant baseball coach, and to transfer Knapp to Harrison Grade School. It is well-settled in this circuit that "a jury verdict will not be set aside if a reasonable basis exists in the record to support that verdict." *Spesco v. General Electric Co.*, 719 F.2d 233,

237 (7th Cir. 1983) (citing *Lenard v. Argento*, 699 F.2d 874, 882 (7th Cir.), *cert. denied*, 104 S. Ct. 69 (1983)). *See also McGill v. Bd. of Ed. of Pekin Elementary Sch.*, 602 F.2d at 780. The credibility of the witnesses and the weight of the evidence are matters within the purview of the jury, especially in a case such as this which turns, in large measure, upon the defendants' motive in making certain decisions. *Lenard v. Argento*, 699 F.2d at 882. Moreover, we are to review the evidence in the light most favorable to the prevailing party; in this case Knapp.

The record reveals that on April 3, 1981, defendants McDavid and Burdette denied Knapp's "personal day" request to see an attorney, with full knowledge that the request related directly to the oral reprimand Knapp received from superintendent Whitaker, just two days previous, for personally contacting Board members. On April 29, 1981, defendant Hatton compiled an evaluation of Knapp's classroom performance and expressly stated that Knapp "is consistently undermining the policies, procedures and general effectiveness of this school and the school district. . . . His insistence on airing personal problems directly with the board is disruptive and will not be tolerated." Similarly, Hatton stated in his April 29, 1982 evaluation that, "[w]hile I still feel that Mr. Knapp's attitude is a problem, . . . I am currently a defendant in a lawsuit in which [Knapp] is the plaintiff. I can no longer be impartial . . . ." Principal McDavid removed Knapp from his baseball coaching position in June 1981, after Knapp had presented his claims of inequitable mileage allowance, inadequate liability insurance, and an ineffective grievance procedure to the Peoria School Board. Finally, on July 27, 1982, Knapp was transferred to Harrison Grade School with the approval of defendants Whitaker, Burdette, and McDavid, who were all well aware of Knapp's direct communication with the School Board members, and who all believed that Knapp's conduct violated Board Policy 2111.10(11), requiring that a teacher's communication to the School Board be directed through the superintendent. In view of this evidence, we hold that there exists a more than reasonable basis in the

record to support the jury's finding that Knapp's constitutionally protected speech was a substantial or motivating factor in each of the defendants' foregoing decisions.

In *Mt. Healthy*, the Supreme Court explained that once the plaintiff demonstrates his speech was constitutionally protected and such speech was a substantial or motivating factor in the defendant's actions, the defendant is entitled to demonstrate "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct." 429 U.S. at 287. *See also Givhan v. Western Line Consol. School Dist.*, 439 U.S. at 416. In the present case, the defendants argue that under the third prong of the *Mt. Healthy* test, they introduced sufficient evidence to establish that the same decisions would have been reached, regardless of Knapp's constitutionally protected speech.[7] According to the defendants, the record contains evidence that Knapp's "personal day" request to see an attorney was denied by principal McDavid and assistant superintendent Burdette because Knapp failed to present his superiors with a compelling reason, as required by Administrative Procedure 4152.7, why he should receive a leave day with pay. The defendants contend that Knapp received negative evaluations because administrative assistant Hatton observed a pattern of attitude problems. The defendants claim that principal McDavid removed Knapp from his position as an assistant baseball coach at Woodruff due to Knapp's phlebitis condition. The defendants further argue that Knapp's transfer to Harrison Grade School resulted from his lack of seniority in the science department at Woodruff. We agree with the defendants that the record contains sufficient evidence to support each of the foregoing conclusions, however, the jury, after weighing

[7] We note that for purposes of this section 1983 civil rights lawsuit, the defendants did not raise the affirmative defense of objective, good faith immunity as set forth in *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

the evidence and determining the credibility of the parties, returned a verdict in favor of Knapp. The jury expressly found that the defendants would not have denied Knapp a "personal day" with pay, given him negative evaluations, removed him from his assistant coaching position, or transferred him to Harrison Grade School if Knapp had not engaged in constitutionally protected speech. It is not our prerogative to invade the province of the jury in its weighing of the evidence and its determination of witness credibility. Because there exists a more than reasonable basis in the record to support a finding that Knapp's constitutionally protected speech caused the defendants' actions, we uphold the jury verdict. *See Crawford v. Garnier*, 719 F.2d 1317, 1322-23 (7th Cir. 1983).

C. ALLEGED TRIAL ERROR

The defendants raise various claims of alleged trial error, only one of which we deem worthy of discussion—jury instruction 10.[8] Following the district court's ruling that Knapp's speech was constitutionally protected, as a matter of law, the court instructed the jury:

> "The court finds that School Board Regulation 2111.11 [sic] directing that communications to Board members be made to the Office of the Superintendent is unenforceable. The actions by Terry Knapp in speaking to Board members, both individually and at a public meeting, were protected by the First Amendment of the Constitution of the United States.

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[8] The defendants claim that the admission of evidence concerning (1) Knapp's community service involvement; and (2) Knapp's assignment to Harrison Grade School as punishment, constitute reversible error. The defendants also contend that the district court's failure to admit the psychologist's report into evidence constitutes reversible error. Upon review of the entire record, we deem these conclusory allegations to be without merit.

> The court also finds that the following conduct violated Terry Knapp's rights:
>
> 1. The oral reprimand given to Terry Knapp by Harry Whitaker on April 1, 1981.
>
> 2. The language contained in the memorandum written by Harry Whitaker to the Board of Education of District 150 on April 1, 1981 referring to Terry Knapp's violation of Board policy.
>
> 3. The written reprimand prepared on April 2 by Harry Whitaker and given to Terry Knapp on April 6.
>
> 4. The language placed in Terry Knapp's April 29, 1981, evaluation referring to his violation of Board policy."

The defendants argued to the district court, in a motion for new trial, that the effect of this instruction was to direct a verdict in favor of the plaintiff. The trial judge responded that:

> "Instruction 10 was given because the Court concluded that the jury had to know that the Court had determined the protected nature of the speech. If this had not been done, the jury would have been forced to consider the interrogatories in a vacuum. If the speech was not protected the interrogatories were meaningless to begin with."

On appeal, the defendants again claim that instruction 10, in effect, directed a verdict for Knapp.

According to the Supreme Court's reasoning in *Pickering*, *Mt. Healthy*, and *Connick*, a three-step analysis is required in a case involving the infringement of a public employee's First Amendment right to free speech. *See Czurlanis v. Albanese*, 721 F.2d 98, 103 (3d Cir. 1983). The initial issue is one of law, whether the plaintiff's speech is constitutionally protected. *See, e.g., Stern v. Shouldice*, 706 F.2d 742, 747-48 (6th Cir.), *cert. denied*, 104 S. Ct. 487 (1983). If this burden is satisfied, the next

question is one of fact, whether the constitutionally protected speech was a substantial or motivating factor in the defendant's actions. If this second burden is satisfied, the third question is also one of fact, whether the defendant defeated the plaintiff's claim by demonstrating that he would have reached the same decision in the absence of the plaintiff's constitutionally protected speech. *See, e.g., McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983).

In the present case, the district court properly ruled that Knapp's speech concerning inequitable mileage allowance, liability insurance, and the grievance procedure was constitutionally protected, as a matter of law. Once Knapp satisfied this initial burden, he was entitled to have the jury consider the factual issue of whether his constitutionally protected speech was a substantial or motivating factor in the defendants' actions. In order for the district court to present this question to the jury, the court was required to inform the jury of its ruling that Knapp's speech was constitutionally protected. *See, e.g., Czurlanis v. Albanese*, 721 F.2d at 108. Furthermore, in the context of this case, the district court was required to inform the jury that the defendants could not rely upon Board Policy 2111.10(11) to justify their actions because that provision improperly restricted speech on matters of public concern. Accordingly, we agree with the district court and hold that it was necessary, and not error, to instruct the jury that Knapp's speech was constitutionally protected.

We add that, in the context of this case, the district court also properly instructed the jury that Knapp's First Amendment right to free speech was violated by (1) superintendent Whitaker's oral reprimand of April 1, 1981; (2) superintendent Whitaker's confidential memo of April 1, 1981, to the Peoria School Board; (3) superintendent Whitaker's written reprimand of April 2, 1981; and (4) administrative assistant Hatton's reference to Knapp's violation of Board Policy 2111.10(11) in the evaluation of April 29, 1981. The defendants admit that each of these actions was taken in direct response to

Knapp's communication with Peoria School Board members. Thus, in view of our holding that Knapp engaged in constitutionally protected speech, each of the defendants' foregoing actions was constitutionally impermissible.

D. LEGAL AND EQUITABLE RELIEF

The defendants next argue that the jury's compensatory damage award of $514,333 was "excessive, unreasonable, [and] unsupported by the record." It is well-settled in this circuit that "the actual measurement of damages is an exercise in fact-finding, which we are not permitted to second-guess unless 'after reviewing the entire record, we are left with a definite and firm conviction that a mistake has been committed.'" *Whitley v. Seibel*, 676 F.2d 245, 252 (7th Cir.), *cert. denied*, 459 U.S. 942 (1982) (quoting *Busche v. Burkee*, 649 F.2d 509, 518 (7th Cir.), *cert. denied*, 454 U.S. 897 (1981)). Indeed, "[i]n determining whether an award is excessive, we are to accord substantial deference to the decision of the jury and will not disturb an award unless we are convinced that it is 'monstrously excessive' or 'so large as to shock the conscience of the court.'" *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1275 (7th Cir. 1983) (citing *Huff v. White Motor Corp.*, 609 F.2d 286, 296-97 (7th Cir. 1979) and *Galard v. Johnson*, 504 F.2d 1198, 1199 (7th Cir. 1974)). *See also Abernathy v. Superior Hardwoods, Inc.*, 704 F.2d 963, 971 (7th Cir. 1983).

A review of the trial record reveals that Knapp claimed "roughly $4,000" in financial loss. This damage claim included the revenue lost from Knapp's removal as assistant baseball coach for the 1981-82 academic year, his removal from study hall supervision for the same 1981-82 academic year, and his nominal payments for the uninsured portion of the psychologist's bill. In addition, Knapp claimed mental suffering, emotional distress, humiliation, and loss of professional reputation that he could not "relate in dollars and cents." It is undisputed that the Peoria School District paid Knapp his full salary for teaching and coaching during the 1980-81 academic year

and for teaching during the 1981-82 academic year, paid his medical bills, except a portion of his psychologist's bill, and continues to pay him an annual salary in excess of $28,600 for his teaching duties at Harrison Grade School. Based upon all of the evidence presented at trial, the jury awarded Knapp $514,333 in compensatory damages.

Knapp's alleged loss of professional reputation stems, in part, from the negative evaluations and memos placed in his personnel file concerning conversations with the Peoria School Board about matters of public concern, his transfer to Harrison Grade School, and his termination as assistant baseball coach at Woodruff High School. At the time the jury considered the issue of compensatory damages, it had no knowledge that Knapp also sought equitable relief in the form of expunging all documents in his personnel file relating to the constitutionally protected speech, reassigning him as a science teacher at Woodruff, and reinstating him as an assistant baseball coach at Woodruff. This equitable relief, which was properly granted by the district court in view of the jury's findings, certainly compensates Knapp for a portion of his lost professional reputation. Thus, Knapp's damages consist of $4,000 in financial loss; the mental suffering, emotional distress, and humiliation within the Peoria community resulting from his exercise of constitutionally protected speech; and the loss of professional reputation following the district court's order of equitable relief.

A public school teacher may recover compensatory damages, under 42 U.S.C. § 1983, for out-of-pocket expenses, mental and emotional distress, community humiliation, and loss of professional reputation caused by the infringement of his constitutionally protected speech. *See Solis v. Rio Grande City Independent School*, 734 F.2d 243, 250-51 (5th Cir. 1984); *McGee v. South Pemiscot School Dist. R-V*, 712 F.2d 339, 344 (8th Cir. 1983). In the present case, however, the jury agreed upon a compensatory damage award in excess of half a million dollars without ever having an opportunity to consider the effect that equitable relief would have upon the award. Our review of the

record, and the fact that the district court's equitable relief clearly reduces Knapp's damages for loss of professional reputation, leaves us with a definite and firm conviction that the jury award of $514,333 is excessive. In *United States v. Bruscino*, 687 F.2d 938 (7th Cir.) (*en banc*), *cert. denied*, 459 U.S. 1228 (1982), we reasoned that when the issue of jury prejudice is raised on appeal, "[t]he trial judge will always be in a better position than the appellate judges to assess the probable reactions of jurors in a case over which he has presided." 687 F.2d at 941. *Cf. Abernathy v. Superior Hardwoods*, 704 F.2d at 971 (trial judge's "superior ability by virtue of having observed the jury first hand, to assess its fairness and competence"). We believe the same rationale applies to the computation of compensatory damages in this case. Accordingly, we remand the case to the district court with instructions that the trial judge review the trial record, "assess the jurors' probable reaction" to the equitable relief, and recalculate the compensatory damage award to an amount between $200,000 and $400,000.

We add that "[u]nder ordinary circumstances a federal court will not review, much less alter, a school board's decision to transfer an employee." *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 645 (8th Cir. 1983). This case does not present us with an ordinary circumstance; the jury clearly attributed Knapp's loss of his teaching and coaching positions at Woodruff High School to the exercise of his constitutionally protected speech. Thus, the district court, in order to effectively implement the jury's findings, properly reassigned Knapp to his previous teaching and coaching positions at Woodruff. *Accord McGill v. Board. of Ed. of Pekin Elementary Sch.*, 602 F.2d at 776. Indeed, the defendants do not contest the court's authority to reinstate Knapp—the defendants simply argue before this court that Knapp is not properly certified to teach high school level science courses in the State of Illinois. The defendants base their claim upon a portion of a letter dated March 23, 1983, from William Helton, Assistant Manager for the Illinois State Board of Education, stating that Knapp is "not qualified

to teach science or health education at the high school level." The defendants contend that they presented this March 23 letter to the district court some six days before the court granted equitable relief, reassigning Knapp to his position as biology teacher at Woodruff High School. Upon review of the record, we are unable to locate any reference by the district court judge to the March 23 letter or any evidence concerning Knapp's lack of teacher certification in the State of Illinois. We find it unusual, if not odd, that Knapp, who taught in the science department at Woodruff for five academic years from September 1977 thru May 1982 and received exemplary ratings, suddenly became "uncertified." In order to clarify this matter, we direct the district court, upon remand, to provide the parties with findings of fact on the issue of Knapp's certification to teach high school level science courses in the State of Illinois.

E. PUNITIVE DAMAGES

On cross-appeal, Knapp claims that the trial court abused its discretion in denying his motion to amend the complaint to include a claim for punitive damages. The record reveals that on November 12, 1981, Knapp filed his original complaint against Peoria School District No. 150, superintendent Whitaker, principal McDavid, and administrative assistant Hatton, alleging, *inter alia*, that the "Defendants were conspirators engaged in a scheme and conspiracy designed and intended to deny and deprive [Terry Knapp] of rights guaranteed to [him] under the Constitution and laws of the United States . . . ." On the issue of damages, the original complaint requested that the "Defendants jointly and severally be ordered to compensation [sic] Plaintiff in the amount of One Million Dollars." On March 25, 1982, Knapp filed a first amended complaint, adding assistant superintendent Burdette as a defendant but continuing to request that "Defendants jointly and severally be ordered to compensate Plaintiff in the amount of One Million Dollars." The parties continued

pretrial discovery and on August 12, 1982, the district court entered the final pretrial order, which included a "written statement of . . . contested issues of fact and law" that made no reference to a punitive damage claim. On November 5, 1982, the defendant filed a motion *in limine* to exclude "any evidence or reference to punitive or exemplary damages . . . ." Some two weeks later, on November 22, 1982, Knapp responded to the motion *in limine* by requesting leave to file a second amended complaint alleging, *inter alia:*

> "The individual Defendants acting individually and in concert with each other willfully and maliciously took actions which were calculated to punish Plaintiff for the exercise of his rights.
>
> * * *
>
> That Defendants HARRY WHITAKER, GEORGE BURDETTE, RUSSELL McDAVID and JOHN HATTON be found liable jointly and severally for punitive damage in the amount of One Million Dollars."

The defendants responded that since the inception of this lawsuit in November 1981, a defense was provided to all the defendants under an insurance policy that included coverage for compensatory damages but excluded the payment of punitive damages. The defendants claimed they would be unduly harmed by a punitive damage claim at this late date because individual counsel would have to be obtained for each defendant to protect his individual interests and, as a result, additional discovery would be required on the issue of punitive damages. On December 17, 1982, the district court denied Knapp's motion to amend, stating that:

> "The Court, after weighing the competing interests, finds that substantial prejudice will result to the Defendants if the Plaintiff is permitted to add a punitive damage claim. A party to litigation must be able to rely on the claims and allegations in the pleadings so that he can plan his case. Here, Defendants have prepared for trial relying on the fact that

there was no mention of punitive damages in the record and Plaintiff's attorney has given no reason why a request for punitive damages was not expressly mentioned in the original complaint. The interjection of punitive damages at this point in the litigation may require each Defendant to seek separate counsel and force present counsel to recuse himself, causing increased delay and expense."

Knapp initially contends that the original and first amended complaints sufficiently alleged a claim for punitive damages if one liberally construes the language contained therein. We disagree. Neither the original nor the first amended complaint alleged willful, malicious misconduct on the part of the individual defendants. Similarly, neither complaint made any mention of punitive or exemplary damages in the prayer for relief. In view of the lack of evidence to support Knapp's claim, we agree with the district court that the original and first amended complaints did not adequately state a claim for punitive damages.

Knapp next contends that the district court abused its discretion in denying his motion to amend the complaint to include a claim for punitive damages. Fed. R. Civ. P. 15(a) provides that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served . . . [o]therwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." According to the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962), "[i]n the absence of any apparent or declared reason—such as undue delay, . . . undue prejudice to the opposing party by virtue of allowance of the amendment . . . —the leave sought should, as the rules require, be 'freely given.'" 371 U.S. at 182. Of course, the grant or denial of a motion to amend the pleadings pursuant to Rule 15(a) is within the discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 330 (1971); *Foman v. Davis*, 371 U.S. at 182. In deciding whether or not to permit the amend-

ment, "the trial court [is] required to take into account any prejudice that [the non-moving party] would ... suffer [ ] as a result ...." *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S at 331.

The record reveals that Knapp filed the instant lawsuit in November 1981 but waited for over a year, until November 1982, before filing a claim for punitive damages. During this year-long period the parties conducted all necessary discovery and in August 1982, the district court entered a final pretrial order defining the issues to be litigated at trial. The pretrial order made no mention of punitive damages and Knapp offers no reasonable explanation for his undue delay in filing such a claim. Moreover, the untimely filed punitive damage claim, if granted, would have clearly prejudiced the defendants who invested a year preparing their defense to the allegations pleaded, without any notice of a punitive damage claim. According to the defendants, the School District's insurance policy covered compensatory damage awards but not awards for punitive, exemplary damages. The inclusion of a punitive damage claim, well after entry of the final pretrial order, would have forced the parties to reopen discovery and obtain independent counsel to represent their individual interests on the issue of non-insured punitive damages. *See, e.g., Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 353 (7th Cir. 1982). The undue harm and delay in reopening discovery and obtaining separate counsel would have resulted in additional expenditures on the part of each defendant. In view of this prejudice, and the fact that the plaintiff waited more than one year to amend the complaint to include a claim for punitive damages, we hold that the district court judge did not abuse his discretion in denying Knapp's motion to amend.

III

We affirm the jury's finding that Peoria School District No. 150 infringed upon Knapp's First Amendment

right to speak on matters of public c ncern and we affirm the denial of Knapp's punitive damage claim, but we remand this case to the district court with instructions to reduce the excessive compensatory damage award to an amount between $200,000 and $400,000. We further direct the district court, on remand, to provide the parties with findings of fact on the issue of Knapp's certification to teach high school level science courses in the State of Illinois.

Circuit Rule 18 shall not apply on remand.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—3-5-85—450

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

April 2, 1985

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

Hon. WILLIAM J. CAMPBELL, Senior District Judge*

TERRY C. KNAPP Plaintiff-Appellee, Cross-Appellant, Nos. 84-1032 & 84-1060 vs. HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body of politic and corporate, and GEORGE BURDETTE, Defendants-Appellants, Cross-Appellees.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division No. 81 C 1185 Michael M. Mihm, Judge.

O R D E R

On consideration of the petition for

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* The Honorable William J. Campbell, Senior District Judge for the Northern District of Illinois, is sitting by designation.

rehearing and suggestion for rehearing in banc filed in the above-entitled cause by defendants-appellants, cross-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel having voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TERRY C. KNAPP, Plaintiff, v. HARRY WHITAKER; RUSSELL McDAVID; JOHN HATTON; PEORIA SCHOOL DISTRICT NO. 150, a body politic & corporate; and GEORGE BURDETTE, Defendants.	)	No. 81-1185

ORDER FOR JUDGMENT
(Filed March 30, 1983)

The Jury having returned its verdict in the trial of this case, and that verdict having found:

"We, the jury, find in favor of Terry Knapp, and against the Defendants; and award damages in the following amount: $514,333.00";

and the Court, having denied Defendants' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial;

and the Court, having ruled at a hearing on March 18, 1983 that, as to Plaintiff's Motion for Equitable Relief:

1) Paragraphs 1, 2, 3, 4, 5, 8, 9, 11, 12B, and 12C are proper subjects for which Equitable Relief shall be granted (the specific form of which relief to be as set out at the end of this Order of Judgment);

2) That Paragraphs 6, 7, 10, and 12A are not proper subjects for Equitable Relief, (based on the record in this case) and said prayers are denied;

3) That as to Paragraphs 8 and 9, although said paragraphs concern prayers for which equitable relief shall be granted, the Court stays equitable relief pending the outcome of the appeal of this case. The Court believes said stay is proper because of irreparable harm that would result to innocent third parties (a present science teacher at Woodruff High

School and the present sophomore baseball coach at Woodruff High School) if said relief were to be granted and the judgment then reversed by the Seventh Circuit Court of Appeals. The Court also notes that, although First Amendment Rights are to be given priority in terms of Equitable Relief, in this circumstance a balancing of the equities makes it clear that the Plaintiff will be less harmed than the said innocent third parties mentioned above.

4) In the event that, during the pendency of the appeal in this case, a vacancy occurs by way of attrition at Woodruff High School for either the position of assistant baseball coach or science teacher, the parties shall advise the Court, and, upon motion of the Plaintiff, this Court shall further consider the question of equitable relief as to those matters.

Now, therefore, the Clerk of this Court is hereby directed:

1) To enter judgment in favor of Plaintiff Terry Knapp and against Defendants Harry Whitaker, Russell McDavid, John Hatton Peoria School District No. 150, and George Burdette in the amount of $514,333.00 as compensatory damages plus costs of suit, said judgment being initially entered on February 2, 1983, prior to the filing of the post-trial motions.

2) As to equitable relief:

(a) All copies of written memoranda dated April 1, 1981, and April 2, 1981, and all references to any violation of Board Policy 2111.10 by Plaintiff are to be expunged from all files maintained by the Defendants.

(b) All copies of the evaluation of Plaintiff dated April 29, 1981 and April 29, 1982, authored by John Hatton and all documentation in support thereof

be removed from all files maintained by the Defendants.

(c) Defendants are enjoined from discriminating or retaliating against Plaintiff for the exercise of his constitutionally protected conduct.

(d) Plaintiff shall be transferred from Harrison Grade School to Woodruff High School and shall be reassigned duties as assistant baseball coach.

3) Upon Defendants' Motion for Stay the Court orders that, pending appeal:

(a) Defendants are to segregate all expunged material in a separate file to be delivered to counsel;

(b) Enforcement of this Court's Order to transfer Plaintiff to Woodruff High School or reassign him to his former coaching position shall be stayed, without bond, but Defendants shall notify the Plaintiff of any vacancies at which time

this Court may, upon motion, reconsider such stay;

(c) Collection of the money judgment against Defendants shall be stayed without bond; and

(d) In all other respects, this Order shall be enforceable as of the date of entry of this Order for Judgment.

ENTERED: March 30, 1983.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

June 30, 1983

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

TERRY C. KNAPP Plaintiff-Appellee	) Appeal from the) United States) District Court
No. 83-1754 vs.	) for the Central) District of
HARRY WHITAKER, et al., Defendants- Appellants	) Illinois, Peoria) Division) No. 81 C 1185) Judge Michael M.) Mihm

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO VACATE THE DISTRICT COURT'S JUDGMENT OR STAY THE APPEAL AND REMAND FOR RECONSIDERATION IN LIGHT OF THE SUPREME COURT'S DECISION IN CONNICK V. MYERS, ___ U.S. ___ 51 LW 4436

(1983), filed herein on May 16, 1983, by counsel for defendants-appellants.

2. "MEMORANDUM IN SUPPORT OF MOTION TO VACATE, ETC." with appendix, filed herein on May 16, 1983, by counsel for defendants-appellants.

3. "MOTION TO DENY THE MOTION OF HARRY WHITAKER, ET AL TO VACATE THE DISTRICT COURT'S JUDGMENT OR STAY THE APPEAL AND REMAND FOR RECONSIDERATION IN LIGHT OF THE SUPREME COURT'S DECISION IN CONNICK V. MYERS, U.S. , 51 U.S.L.W. 4436 (1983)" filed herein on May 31, 1983, by counsel for plaintiff-appellee.

4. "PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO VACATE, ETC., AND IN SUPPORT OF MOTION TO DISMISS DEFENDANTS' APPEAL" with appendix, filed herein on May 31, 1983, by counsel for plaintiff-appellee.

5. "MOTION TO SET BRIEFING SCHEDULE" filed herein on May 31, 1983, by counsel for plaintiff-appellee.

6. "RESPONSE TO PLAINTIFF'S MOTION TO DISMISS APPEAL" filed herein on June 6, 1983, by counsel for defendants-appellants.

7. "RESPONSE TO MOTION TO SET BRIEFING SCHEDULE" filed herein on June 6, 1983, by counsel for defendants-appellants.

8. "MOTION FOR CLARIFICATION" filed herein on June 7, 1983, by counsel for plaintiff-appellee.

The motion to vacate the district court judgment is DENIED. This case is REMANDED to the district court for reconsideration in light of the Supreme Court's decision in Connick v. Myers, 51 L.W. 4436 (1983).

Instruction No. 10

The Court finds that school board regulation 2111.11 directing that communications to board members be made through the office of the superintendent is unenforceable. The actions by Terry Knapp in speaking to board members both individually and at a public meeting were protected by the First Amendment of the Constitution of the United States.

The Court also finds that the following conduct violated Terry Knapp's rights:

(1) The oral reprimand given to Terry Knapp by Harry Whitaker on April 1, 1981.

(2) The language contained in the memorandum written by Harry Whitaker to the Board of Education of District 150 on April 1, 1981, referring to Terry Knapp's violation of board policy.

(3) The written reprimand prepared on April 2 by Harry Whitaker and given to Terry Knapp on April 6.

(4) The language placed in Terry Knapp's April 29, 1981,

evaluation referring to his violation of board policy.

There are disputed issues of fact which are to be decided by the jury.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

TERRY C. KNAPP, Plaintiff, v. HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE, Defendants.	)	No. 81-1185

ORDER
(Filed December 5, 1983)

On November 12, 1981, Plaintiff, Terry C. Knapp, a public high school teacher, filed suit against Peoria School District No. 150 and three individually named Defendants, Harry Whitaker, Superintendent of Schools; Russell McDavid, Principal of Woodruff High School; and John Hatton, Assistant Principal, alleging an abridgment of his First Amendment right to free speech and further alleging that Defendants had retaliated against him for exercising his First Amendment rights. An

additional Defendant, George Burdette, the Assistant Superintendent of Schools, was named at a later date.

After a jury trial, which began January 25, 1983, Plaintiff was awarded $514,333 in compensatory damages.[1] Immediately prior to trial the Plaintiff filed a motion for partial summary judgment, requesting the Court to rule that his speech was, as a matter of law, protected by the First Amendment and that the actions taken by the Defendants, in response to Plaintiff's protected speech, constituted a violation of his First Amendment rights. At trial, the Court ruled that Mr. Knapp's speech was protected and that the Board policy, relied on by the Defendants as justification for their

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[1]The Court by written order dated December 17, 1982, denied Plaintiff's request to add a punitive damage claim to the complaint.

actions against Plaintiff, was unconstitutional on its face as well as the manner in which it was applied to Mr. Knapp.

The jury was advised of the Court's ruling by jury instruction[2] and were given four two-part special interrogatories to

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[2]The jury was instructed as follows:

The Court finds that school board regulation 2111.11 directing that communications to board members be made through the office of the Superintendent is unenforceable. The actions by Terry Knapp in speaking to board members, both individually and at a public meeting, were protected by the First Amendment of the Constitution of the United States.

The Court also finds that the following conduct violated Terry Knapp's rights:

1. The oral reprimand given to Terry Knapp by Harry Whitaker on April 1, 1981.
2. The language contained in the memorandum written by Harry Whitaker to the Board of Education of District 150 on April 1, 1981, referring to Terry Knapp's violation of board policy.
3. The written reprimand prepared on April 2 by Harry Whitaker and given to Terry Knapp on April 6.
4. The language placed in Terry Knapp's April 29, 1981 evaluation referring to his violation of board policy.

record their verdict. The jury answered these in favor of the Plaintiff in each instance, specifically finding that Knapp's constitutionally protected conduct was a "substantial or motivating factor" in the Defendants' decision to transfer Plaintiff, deny him a personal leave day, give him negative evaluations, and remove him from his coaching position.

Following trial, the Defendants' motions for judgment notwithstanding the verdict, for a new trial, or amendment of the judgment were denied by the Court.

On April 22, 1983, the Defendants filed a notice of appeal to the Seventh Circuit. The Seventh Circuit, pursuant to the Defendants' motion to vacate the District Court's judgment or stay appeal and remand the record in light of the Supreme Court's decision in Connick v. Meyers[sic], ___ U.S. ___, 103 S.Ct. 1684 (1983), denied the motion to vacate but

remanded the case to the District Court for reconsideration.

FACTS

The history of this case dates back to the fall of 1980, when the teachers and School District 150 were engaged in collective bargaining negotiations. During these negotiations, one of the three most important topics (according to the teachers) was the issue of the effectiveness of the operation of the grievance procedure under the collective bargaining agreement.

The teachers made their dissatisfaction with the grievance procedure known to the school board at a school board meeting on October 20, 1980. At that meeting, the board members present invited any teachers with examples of how the grievance procedure was not working to bring them to their attention.

Pursuant to this invitation, the Plaintiff contacted board member Betty Cleaver, informing her that he had information about the grievance procedure. Plaintiff and Mrs. Cleaver scheduled a meeting to discuss the grievance procedure at a later date and Mrs. Cleaver indicated that it would be appropriate for Mr. Knapp to contact other board members regarding the grievance procedure. During the week following the October 20 board meeting, the Plaintiff met with several board members to discuss the grievance procedure.

There is no dispute that Plaintiff arranged these meetings at the convenience of the respective board members and was courteous and well mannered throughout. The meetings took place at either the board members' homes or offices.

At these meetings, the Plaintiff explained how the grievance procedure had

failed to work in the past and gave specific examples of its failure. The examples cited by Plaintiff involved problems with mileage and liability insurance, evaluations, curriculum and classroom assignments. Plaintiff cited these examples primarily in the context of the failure of the grievance procedure.[3]

All of the board members actively participated in the conversations with Mr. Knapp and indicated their desire for future communications. At no time during these meetings was Mr. Knapp informed that he was violating any board policy nor did any board members seek to have Mr. Knapp disciplined for his conduct.

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[3]The Defendants in their memorandum attempt to place each of the examples cited by Mr. Knapp evidencing the ineffectiveness of the grievance procedure on an equal footing. However, at trial the primary focus was on the grievance procedure itself and the examples of its ineffectiveness in dealing with the mileage reimbursement and the

(Footnote Continued)

Furthermore, while some of the board members contacted Superintendent Whitaker and informed him of Plaintiff's conversations with them, Mr. Whitaker made no effort to inform Mr. Knapp that he was in violation of board policy or had done anything improper.

In March, 1981, Plaintiff filed a grievance based on (1) the unequal mileage reimbursement from the school district with regard to coaches and (2) the lack of liability insurance provided to coaches who drove students to athletic events. The grievance was denied, however, on the basis that it involved a matter not personal to Plaintiff and was considered a "class action" matter.

(Footnote Continued)
liability insurance issues. The classroom allocation and curriculum issues received relatively little attention during the trial.

Following this denial, Plaintiff attempted to obtain sponsorship at the next school board meeting to be held April 6, 1981 in order to express his views regarding the grievance procedure. He contacted several board members for this purpose and sent a copy of his previously denied grievance to all board members (at board member Ed Glover's request and with the permission of Defendant Russell McDavid). Eventually, board member Marilyn Ketay agreed to sponsor Knapp at the April 6 meeting.

On April 1, 1981, Superintendent Whitaker met with Plaintiff and orally reprimanded him for his conduct of contacting board members. At this meeting, Whitaker informed Plaintiff of board regulation 2111.11, which requires that any communications to board members be made through the office of the Superintendent. Whitaker told Knapp at this

meeting that he was "not to talk to any board member about any educational issues". Mr. Knapp indicated to the Superintendent that he felt this violated his rights, to which Mr. Whitaker responded "Your rights end where my nose begins". Mr. Whitaker concluded by indicating that any further contacts by Knapp to board members would result in Mr. Knapp being found insubordinate.

That same day Mr. Whitaker sent a written memorandum to the Board of Education, severely criticizing Knapp for contacting board members, and indicating that he would monitor Mr. Knapp's conduct in the future. He also expressed his opinion of Mr. Knapp's grievance. The memo to the Board reads as follows:

> "I have been receiving information that Terry Knapp is contacting the Board again on an issue concerning payment for the transportation of students. In fact, Dr. Glover has said that Terry has talked to him and he is probably going to sponsor him

Monday night. I think Marilyn has also been contacted by Terry plus, I believe, he sent each Board member a written grievance. I don't know if he has contacted any of you by phone, other than Dr. Glover and Marilyn Ketay.

I asked for a meeting with Terry and I met with him this morning. I pointed out that Board policy 2111.10, Superintendent of Schools, Item #11 states 'communicate, or cause to be communicated, to all employees all action of the Board relating to the several employees, and all communications made to the Board shall be through him.' I pointed out that this wasn't the first time that he was outside of Board policy and that from now on communication with the Board should go through the superintendent. He was very argumentative, as always, and said Board members encouraged him to call them, write them, etc. and that he was going to pay attention to the Board members. I again pointed out to him that he is outside of Board policy and that I expected him to stay within Board policy.

If Terry continues to bypass the administration with regard to communications, I am going to recommend his dismissal. He is becoming a person who is quite belligerent and creates havoc at Woodruff High School. I am sorry that Russ every employed

him because this has been his history at other school districts. I will keep you posted.

His gripe is that Woodruff only pays him 12 cents per mile when he transports youngsters for ball games. Student Activity Funds Policy 5135.11 speaks to the authority of the superintendent and principal with regard to setting regulations and policies for the school activity fund. Items 2, 3, 21, and 22, I believe, give the superintendent and principal the right to regulate the activity funds and determine how much will be paid to those who work in the activities.

Also, Board Policy 4116.2 states that 'a grievance' is a condition in the school system which an individual teacher believes is wrong, unjust or oppressive, but excluding issues such as changes in salary and policy of the Board of Education which relate to teachers as a whole.' Since the teachers at Woodruff are all treated alike with regard to how much they are paid for transportation of students, we believe this is an issue related to teachers as a whole and therefore is not grievable.

There is a fine line here because some of the teachers in some of the other schools might get paid more according to the wealth of their athletic fund, but they are all paid evenly.

> In other words, we don't have individual athletic funds paying teachers at different rates.
>
> I am sure Terry is going to pursue this matter. So far, we believe we are on solid ground. I am going to continue monitoring Terry's actions."

On April 2, 1981, Mr. Knapp requested a personal leave day to see a lawyer to obtain information concerning his rights to speak at the board meeting. Mr. Knapp's request was denied on Friday, April 3, 1981.

On April 6, 1981, Plaintiff received the following written reprimand from Mr. Whitaker:

> "This letter is to record a conference held by me with Terry Knapp, teacher at Woodruff High School. Also present were John Hatton and Roger Clemer, administrative assistants at Woodruff High School.
>
> I asked for the conference with Terry to point out to him that he is in violation of board policy 2111.10 which deals with communication with Board members without first sending these communications to the Superintendent of Schools. This has

> been taking place for some time and I have not been concerned. However, I believe now that it has become somewhat of a problem. I asked Terry at the conference to stay within board policy. I don't believe that he was aware that he was in violation of Board policy and I believe he will not deliberately violate the policy in the future. He has been asked to remediate this aspect of his conduct.
>
> This letter is to be placed in Terry's personnel file. Harry F. Whitaker."

At the April 6 board meeting, Mr. Knapp was called to the podium and Marilyn Ketay announced that she was sponsoring him to speak at the meeting. When Mr. Knapp began to speak, however, Mr. Whitaker stated to him: "You are out of order. You cannot talk at this board meeting, you are talking on a personal issue."

Despite Mr. Whitaker's statements, Mr. Knapp was allowed to speak by the board members and related to those present

what he perceived to be the problems with the grievance procedure.

On April 29, Mr. Knapp was given an evaluation which, among other things, admonished him for talking to board members both individually and at public meetings about his personal employment problems (in violation of board policy 2111.11) and ordered him to refrain from doing so in the future. He was placed in a remediation category which is one step above discharge.

On June 16, 1981, he was removed from his coaching position at Woodruff High School. The Defendants have asserted that Plaintiff was removed from his coaching position because of his phlebitis condition. Later, in the fall of 1981, Knapp's paid study hall was taken away from him because of his remediation status and at the end of the 1981-82 school year he was given a second critical evaluation and was

involuntarily transferred from Woodruff High School to Harrison Grade School.

DISCUSSION

This case has been remanded to the District Court for reconsideration in light of the Supreme Court's decision in Connick v. Meyers[sic], ___ U.S. ___, 103 S.Ct. 1684 (1983). However, I do not believe that the Connick case requires a reversal of either the Court's or the jury's earlier findings.

In Connick, an assistant district attorney in New Orleans, after objecting to her transfer to another section of the criminal court, circulated a questionnaire to her fellow staff members. The purpose of the questionnaire was to solicit:

> "the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, a level of confidence in the supervisors, and whether employees felt pressured to work

in political campaigns". Connick, slip opinion at p. 2.

One of the other assistant district attorneys contacted the district attorney for the Orleans Parish, Harry Connick, and informed him that Meyers[sic] was creating a "mini insurrection" within the office. Connick then met with Meyers[sic] and told her that she would be terminated for her refusing to accept the transfer and that her circulation of the questionnaire was "an act of insubordination".

The Court, in examining whether the plaintiff's rights had been violated, first focused on whether Meyer's[sic] questionnaire could be "characterized as constituting speech on a matter of public concern". Connick, slip opinion at p. 7. After determining that one of the questions in the questionnaire "touched upon a matter of public concern, and contributed to her discharge", the Court was then required to determine "whether Connick was

justified in discharging Meyers[sic]". Connick, slip opinion at p. 11.

The Court concluded:

> "Meyers'[sic] questionnaire touched upon matters of public concern in only a most limited sense; her survey, in our view, is most accurately characterized as an employee grievance concerning internal office policy. The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Meyers'[sic] discharge therefore did not offend the First Amendment." Connick, slip opinion at p. 15.

I believe that while Connick may be factually distinguishable from our case, even the application of the principles set forth in Connick do not support a change in any earlier rulings by this Court.

Following the principles set forth in Connick, the Court must first consider whether Mr. Knapp's speech involved a

matter of "public concern". As stated in Connick:

> "Our task, as we defined it in Pickering [Pickering v. Board of Education, 391 U.S. 563 (1968)], is to seek 'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees'." 391 U.S., at 568. Connick, slip opinion at p. 4.
>
> * * *
>
> "Pickering, its antecedents and progeny, lead us to conclude that if Meyers[sic] questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Connick, slip opinion at p. 8.
>
> * * *

> "We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of a personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Connick, slip opinion at p. 9.

Conversely, an employee's speech on matters of public concern occupies the "highest rung of the heirarchy[sic] of First Amendment values" and is entitled to special protection. Connick, slip opinion at p. 6 (citations omitted).

Whether certain speech may be considered a matter of public concern is determined by the "content, form, and context of a given statement, as revealed by the whole record". Connick, slip opinion at p. 9.

The issue of whether Mr. Knapp's speech involved matters of "public concern" was not really developed before or

during the trial.[4] However, it is clear that the thrust of his meeting with individual board members and at the board meeting was to make known the problems with the grievance procedure. Mr. Knapp made his comments in response to the board members' express request that they be made aware of any problems any teacher had with the grievance procedure. The board members were anxious to learn of Mr. Knapp's problems and even requested that he contact them in the future.

In contrast, the Plaintiff in Connick distributed the questionnaire solely in response to her displeasure with her transfer. Furthermore, as the Court noted in Connick:

---

[4]At the trial, the overwhelming thrust of the defense was that legitimate reasons existed for every action that the Defendants took and their conduct was not pretextual. Apparently now, on appeal, the Defendants have decided to change the focus of their defense.

> "Meyers[sic] did not seek to inform the public that the district attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases nor did Meyers[sic] seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others." Connick, slip opinion at p. 9.

However, this is precisely what Mr. Knapp was attempting to do in this case. The effectiveness and proper operation of the grievance procedure was an important issue to the teachers in District 150 and could potentially affect the efficient operation of the school system as a whole. His conversations with the board members and at the board meeting were an attempt by him to make the issues known and seek to have the problems as he perceived them corrected.

Furthermore, some of the examples cited by Mr. Knapp indicating the ineffectiveness of the grievance procedure were

clearly and unequivocably matters of public concern. For instance, Mr. Knapp's concern with the school district's liability insurance affected not only the teachers in the school district but also the students and their parents, who occasionally provided transportation to athletic events. Indeed, the Defendants' original denial of Mr. Knapp's grievance on this issue was because they felt it was in the nature of a "class action" rather than merely a personal matter.

Accordingly, the Court finds that Mr. Knapp's speech, with its focus on the operation of the grievance procedure, was a matter of public concern.

At this point, the Court would like to indicate its complete disagreement with the statement on page 14 of the Defendant's[sic] Memorandum on Remand which states:

> "If any or all of Knapp's speech was unprotected, Defendants must

> be granted judgment notwithstanding the verdict, and Plaintiff must be 'out of court'." (emphasis added).

This result is entirely contrary to the Court's decision in Connick. The Court in Connick stated:

> "Because one of the questions in Meyers'[sic] survey touched upon a matter of public concern, and contributed to her discharge we must determine whether Connick was justified in discharging Meyers[sic]." Connick, slip opinion p. 11. (emphasis added).

The Defendants seem to have inverted the holding of the Connick case. This Court must determine whether any or all of Knapp's speech was protected rather than unprotected as suggested by the Defendants. If any of the speech is found to be protected (as the Court has already indicated it is) then the Court must move to the next stage of the Connick test and balance the interests of the school district in the efficient operation of its

system with the Plaintiff's right to speak on matters of public concern.

Initially, with regard to the balancing test, the Court notes that there were no allegations by the Defendants that Plaintiff's conduct was in any way whatsoever disruptive in nature. In fact, the counsel for the Defendants stated at the jury instruction conference:

> "We are not going to have a factual question here for the jury on whether or not the speech disrupted the activities at Woodruff High School. The jury is not going to be called upon to answer that question because we don't have a disruption issue here."

Thus, Mr. Knapp's conduct could not be viewed as a "mini insurrection" as was the case in Connick. Further, there is no evidence that Knapp's conduct interferred with his ability to perform his responsibilities.

In Connick the Court considered the manner, time, and place in which the

protected speech was made to be a relevant factor in the balancing test. There the Court noted that the questionnaire was prepared and distributed at the office in a manner which distracted Meyers[sic] as well as their colleagues from their official work. Again, this does not appear to be the case with Mr. Knapp's conduct. His speech in the fall of 1980 was done in response to the board members' request that they be informed of problems with the grievance procedure. As noted previously, the board members encouraged the initial contact from Mr. Knapp as well as any subsequent information he could relate to them regarding the grievance procedure. In the spring of 1981, Mr. Knapp contacted certain board members requesting that they sponsor him for the

April 6 school board meeting.[5] After receiving his sponsorship, Mr. Knapp spoke at the board meeting regarding the operation of the grievance procedure.

At no time during his conversations with the board members was he informed that he was in violation of board policy nor did any of the members seek to have him disciplined for his actions.

The Defendants have attempted to justify their actions based on board policy 2111.11, which requires that communication between any employee and a board member must be made through the Superintendent of Schools. Board policy 2111.11, listed under the "Powers and Duties" of the Superintendent, states:

> "Communicates, or cause to be communicated, to all employees, all actions of the Board

---

[5]Anyone wishing to speak at a school board meeting was required to obtain sponsorship from a board member in order to speak at a board meeting.

> relating to the several employees, and all communications made to the Board shall be through him."

Mr. Knapp was first informed of board policy 2111.11 at his meeting with Superintendent Whitaker on April 1, 1981.

This Court believes that board policy 2111.11 was unconstitutional both on its face and its application to Mr. Knapp. The requirements of policy 2111.11 were not limited to personal or non-public matters (or written as opposed to oral communication) but included any communications to a board member. By channeling all communications to board members through the Superintendent, the Superintendent is given complete control in determining which items will reach the ears of the board members. The policy sets no guidelines or limits on the Superintendent's discretion in this area.

The application of this policy in the case before us demonstrates its

unconstitutionality. In the fall of 1980 Mr. Knapp communicated with board members with the knowledge of Superintendent Whitaker and no action was taken. However, in the spring of 1981, when the school administration apparently began to disapprove of Plaintiff's actions, Mr. Whitaker cited policy 2111.11 in an attempt to silence Mr. Knapp.

Board policy 2111.11 is not contained in the teachers job description but is only found in the Superintendent's job description. There is no indication that any teacher had been informed of its existence nor had any teacher ever been disciplined for its violation. In fact, several teachers testified that they had communicated both orally and in writing to board members without channeling their communications through the Superintendent.

Thus, the Court ruled, as a threshold matter, that policy 2111.11 was violative

of the First Amendment. Accordingly, the Defendants could not rely on policy 2111.11 to justify their reprimand of the Plaintiff or for restricting his speech to board members both individually and in public meetings.

Finally, the Court must consider the context in which the dispute arose. If an employee's speech involves "an employment dispute concerning the very application of that policy to the speaker", the employer's belief that his authority may be subverted is entitled to greater weight. See Connick, slip opinion at p. 15.

While Mr. Knapp was affected by the issues he presented to the board members the record does not indicate that he was motivated solely by personal interest. The grievance procedure was listed by the teachers as one of the three most important issues in the collective bargaining negotiations in the fall of 1980. It was

a topic on which the board members felt they were not fully informed and encouraged teachers to make known to them any relevant facts regarding the grievance procedure.

Also, as mentioned previously, the liability insurance issue cited by Mr. Knapp affected not only Mr. Knapp and all the teachers in the district but the students and their parents as well. Thus it could not be said that Plaintiff, in reporting to board members the problems with the grievance procedure, was motivated by purely personal reasons.

As to Defendants' comments (page 31 of their Memorandum on Remand) that the giving of jury instruction #10 was reversible error, I can only say that the jury instructions in the case were hammered out over several hours of lively debate. Instruction 10 was given because the Court concluded that the jury had to know that

the Court had determined the protected nature of the speech. If this had not been done, the jury would have been forced to consider the interrogatories in a vacuum. If the speech was not protected, the interrogatories were meaningless to begin with.

Based on the foregoing discussion it is the Court's decision that the case of Connick v. Meyers[sic], ___ U.S. ___, 103 S.Ct. 1684 (1983), does not affect any of this Court's rulings in this case and, therefore, IT IS ORDERED that the Defendant's[sic] Motion for Reconsideration is DENIED.

ENTERED: December 5th, 1983.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 84-1032 and 84-1060

TERRY C. KNAPP,

Plaintiff-Appellee,

vs.

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE,

Defendants-Appellants.

Appeal from the United States District Court for the Central District of Illinois
Honorable Michael M. Mihm, U.S. District Judge Presiding

NOTICE OF APPEAL
TO THE
SUPREME COURT OF THE UNITED STATES
(Filed April 15, 1985)

Notice is hereby given that HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE

BURDETTE, the Defendants above named, hereby appeal to the Supreme Court of the United States from the final order and decision, entered in this action on March 5, 1985, with the timely Petition for Rehearing denied on April 2, 1985, affirming that part of the decision below relating to Plaintiff's First Amendment rights and School Board Policy 2111.10(11) and reversing in part and remanding the case with instructions to reduce the excessive compensatory damage award, being the judgment and decisions of the District Court of March 30, 1983 and December 5, 1983.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Dated at Peoria, Illinois, this 12th day of April, 1985.

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE

BURDETTE, Defendants-Appellants, by their Attorneys, KAVANAGH, SCULLY, SUDOW, WHITE & FREDERICK, P.C.

By /s/Phillip B. Lenzini
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PROOF OF SERVICE

The undersigned, PHILLIP B. LENZINI, hereby certifies that the foregoing Notice of Appeal to the Supreme Court of the United States was served on the attorneys of record by depositing a copy in a U. S. Post Office Mail Box, postage fully prepaid, addressed to each of the following by first class mail:

Patricia C. Benassi
1112 First National Bank Building
Peoria, Illinois 61602

Michael Radzilowsky
221 N. LaSalle Street, Suite 2600
Chicago, Illinois 60601,

on April 12, 1985, being all parties required to be served.

/s/ Phillip B. Lenzini
Phillip B. Lenzini
Member of the Bar of the United States Supreme Court

EXCERPT FROM:

CHARTER
BOARD OF SCHOOL INSPECTORS
PEORIA SCHOOL DISTRICT

An Act to reduce the charter of the City of Peoria, and the several acts amendatory thereof, into one act, and revise the same....

Sec. 8. The Board of inspectors shall hold stated meetings, and the president or any two members of said Board may call special meetings, by notice to each of the members of said Board, served personally or left at his usual place of abode; and shall have power - ...Tenth - And generally to have and possess all the rights, powers and authority necessary for the proper management of the schools and the fund belonging to the city for school purposes, with power to make all such rules and ordinances as may be necessary to carry these

powers and duties into effect, and perfect a good system of public instruction and schools in said city....

Approved February 20, 1869.

EXCERPTS FROM SCHOOL CODE,

CHAPTER 122, ILLINOIS REVISED STATUTES

§10-2. ...The directors of each district shall be a body politic and corporate, by the name of "school directors of district No.....:, county of ..... and State of Illinois," and by that name may sue and be sued in all courts and places where judicial proceedings are had.

* * *

§10-20. Duties of school board. The school board has the duties enumerated in Sections 10-20.1 through 10-20.27.

* * *

§10-20.5. ...To adopt and enforce all necessary rules for the management and government of the public schools of their district. Rules adopted by the school board shall be filed for public inspection

in the administrative office of the district.

* * *

§10-20.20. Protection from suit. To indemnify and protect school districts, members of school boards, employees, volunteer personnel authorized in Sections 10-22.34, 10-22.34a and 10-22.34b of this Code and student teachers against civil rights damage claims and suits, constitutional rights damage claims and suits and death and bodily injury and property damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board. Such indemnification and protection shall extend to persons who were members of school boards, employees of school boards, authorized volunteer personnel or student

teachers at the time of the incident from which a claim arises....

* * *

§10-21.4. Superintendent-Duties. Except in districts in which there is only one school with less than four teachers, to employ a superintendent who shall have charge of the administration of the schools under the direction of the board of education. In addition to the administrative duties, the superintendent shall make recommendations to the board concerning the budget, building plans, the locations of sites, the selection of teachers and other employees, the selection of textbooks, instructional material and courses of study. The superintendent shall keep or cause to be kept the records and accounts as directed and required by the board, aid in making reports required by the board, and perform such other duties as the board may delegate to him.

* * *

§10-22.34. Non-certificated personnel. School Boards may employ non-teaching personnel or utilize volunteer personnel for non-teaching duties not requiring instructional judgment or evaluation of pupils.

* * *

§10-22.34a. Supervision of non-academic activities. To designate non-certificated persons of good character to serve as supervisors, chaperones or sponsors, either on a voluntary or on a compensated basis, for school activities not connected with the academic program of the schools.

* * *

§19-8. Bonds to pay claims. Any school district or non-high district operating under general law or special charter having a population of 500,000 or less is authorized to issue bonds for the

purpose of...the payment of claims against any such district.

Such bonds may be issued in an amount, including existing indebtedness, in excess of any statutory limitation as to debt but subject to the 5% constitutional limit.

* * *

§19-13. Sale or exchange of bonds. Any bonds issued under Sections 19-8 to 19-11, inclusive, may be exchanged par for par for claims or unpaid orders for wages of teachers, or both, or may be sold and the proceeds received used to pay such claims or orders.

* * *

§19-15. Authority to refund bonds. When a school district has issued bonds or other evidence of indebtedness for any purposes which are binding and subsisting legal obligations and remaining outstanding, the school board of the district may,

upon the surrender of the bonds or other evidences of indebtedness, issue in lieu thereof to the holders or owners thereof or to other persons for money with which to pay them, new bonds or other evidences of indebtedness, according to the subsequent provisions of this Article.

* * *

§33-1. In all school districts, including special charter districts having a population of 100,000 and not more than 500,000, which adopt this Article, as hereinafter provided, there shall be maintained a system of free schools in charge of a board of education, which shall be a body politic and corporate by the name of "Board of Education of the City of....."....

* * *

§33-4. Rights, powers and duties of board. The board of education shall succeed to all rights, powers and duties

of the former governing body of the district.

Office-Supreme Court, U.S.
FILED
JUL 26 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1824

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE, Appellants,

v.

TERRY C. KNAPP, Appellee,

Appeal From The United States Court Of Appeals For The Seventh Circuit

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APPELLANTS' BRIEF OPPOSING MOTION OF APPELLEE TERRY C. KNAPP TO DISMISS OR AFFIRM

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July 24, 1985

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NO. 84-1824

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE, Appellants,

v.

TERRY C. KNAPP, Appellee,

Appeal From The United States Court Of Appeals For The Seventh Circuit

APPELLANTS' BRIEF OPPOSING MOTION OF APPELLEE TERRY C. KNAPP TO DISMISS OR AFFIRM

HARRY WHITAKER, RUSSELL McDAVID, JOHN HATTON, PEORIA SCHOOL DISTRICT NO. 150, a body politic and corporate, and GEORGE BURDETTE respectfully submit this Brief opposing the motion of Appellee, Terry C. Knapp, to dismiss or affirm the appeal. Both the Jurisdictional Statement and the Motion to Dismiss or Affirm were organized

in three parts, each addressing one of the questions presented. That organization is followed here.

I.

SCHOOL DISTRICT BOARD POLICY 2111.10(11) IS A STATE STATUTE FOR PURPOSES OF 28 U.S.C. §1254(2), AND IT WAS RULED UNCONSTITUTIONAL BY BOTH LOWER COURTS.

Plaintiff-Appellee's motion to dismiss or affirm the appeal does not recite any authority supporting the view that the school board policy at issue is not a state statute for purposes of 28 U.S.C. §1254(2). The motion neither discusses nor distinguishes the prior precedents of this Court cited in the Jurisdictional Statement at note 2. Accordingly, the motion should be denied.

Plaintiff-Appellee characterizes School Board Policy 2111.10(11) as a "part of the superintendent's job description,"

and thereby attempts to diminish the significance afforded the policy. The existence of the policy properly legislated by the school district sitting in its capacity as a sovereign unit of local government in Illinois cannot be denied. Whatever plaintiff's characterization of that policy, it meets or exceeds the tests for "a state statute" under 28 U.S.C. §1254(2), giving rise to appellate jurisdiction in this Court. Moreover, this Court's language in the case of Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 at 1693, n.14 (1983), indicated that an "announced office policy" was not a precondition to discipline, but that a preannounced rule would strengthen the employer's position.

Plaintiff's subsidiary argument that the school board policy is either vague or overbroad cannot stand in light of the Court of Appeals' own construction or

recognition that the defendants here placed a narrow interpretation on that policy such that its scope related only to personal grievances and not matters of genuine public interest and concern. The series of federal decisions in the cases of Adamian v. Jacobsen, 359 F.Supp. 825 (D.C.Nev. 1973), rev'd 523 F.2d 929 (CA 9, 1975), on remand aff'd 608 F.2d 1224 (CA 9, 1979), hold that it is error to construe a regulation of a unit of local government in the same fashion and with the same scrutiny as deciding a federal statute or regulation. At the very least, the construction of a state regulation requires a determination on facial validity only "on its meaning as authoritatively construed by a state court or agency." Because the school district here has narrowly interpreted the scope of the board policy at issue, that authoritative construction must be considered by federal

courts questioning its constitutionality. As the court in Adamian pointed out, the local construction must be given great deference as it is that unit which issued and enforced it. 523 F.2d at 932. The Adamian courts were considering a regulation not unlike the one involved here as it related to a teacher's alleged free speech rights and a challenge that the regulation was vague and constitutionally overbroad. The regulation there, read in conjunction with the standards of the American Association of University Professors, was not unconstitutional, and the Court denied the claim under Pickering v. Bd. of Ed., 391 U.S. 563 (1968).

Plaintiff has not argued the overbreath or vagueness of School Board Policy 2111.10(11) since the trial court ruled it unconstitutional on other grounds. The decisions of the lower courts here did not rest on vagueness or overbreath but rather

that any restraint, however justified or however minor, found in a chain of command policy was unconstitutional under the First Amendment. The argument made here does illuminate the refusal by the lower courts to give any deference to the regulation of a sovereign unit of local government, especially in light of the proper deference which should have been given under either the language of Connick v. Myers or the Adamian cases. This is evidenced by the lack of concern by both Courts as to whether plaintiff's speech was on private issues or matters of public concern. Although the trial court determined the speech was all on matters of public concern it stated its hesitancy to characterize some of the issues as anything but personal. The Court of Appeals expressly determined that two of the topics were solely matters of personal

interest but refused to remand for a new trial.

As these matters pertain to First Amendment rights, public employer's prerogatives, and responsibilities in dealing with employee grievances, they are of substantial concern and justify this appeal.

II.

PLAINTIFF-APPELLEE'S CLAIM THAT THERE IS AMPLE EVIDENTIARY SUPPORT IN THE RECORD TO SHOW THE LEGITIMATE REASONS OFFERED BY DEFENDANTS WERE PRETEXTUAL IS WITHOUT SUPPORT.

In Plaintiff-Appellee's motion there are twelve pages of material that plaintiff claims is ample evidentiary support for the jury's conclusions and that that evidence indicates defendants' reasons were pretextual. The matters and things set out on pages 30 through 42 are totally

conclusionary characterizations by the plaintiff without a single citation to witness testimony or evidence in the record.

As pointed out in the Jurisdictional Statement, the value-laden language used by the Court in its instructions and special interrogatories to the jury masked any true consideration by that jury under the doctrine of Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977). We contend the trial court prejudiced the jury: (1) by directing a verdict for plaintiff, (2) by indicating the court's determination that plaintiff's constitutional rights were violated, (3) by stating that plaintiff had participated in constitutionally protected speech. To ask that same jury if defendants would have taken the same action anyway was error and led to a biased resolution of the factual disputes.

Where federal courts by their instructions and tolerance of plaintiff's arguments permit the poisoning of jurors' minds as to the factors underlying the employment decision, the Mt. Healthy doctrine has not been met. Legitimate, independent reasons existed for the actions taken with regards to plaintiff but they were displaced by undue emphasis on alleged protected conduct, the Court's directed verdict instruction, and value-laden interrogatories. This was exacerbated because the trial court instructed the jury that all of plaintiff's conduct was protected. [The Court of Appeals expressly found that some of that conduct was not protected.]

In Connick v. Myers this Court determined that many of the elements Myers spoke of were solely personal matters and not of public concern. It reversed the lower courts and entered judgment for the

public employer rather than remanding for a further determination under Mt. Healthy as to which conduct, protected or unprotected, led to the employment decisions. Here, the case should have been remanded for a new trial to properly instruct and apply the Mt. Healthy doctrine to that conduct which the Court of Appeals determined to be protected. If plaintiff was reprimanded because of his speech on personal matters, then the defendants under the Mt. Healthy doctrine have an absolute right to a jury instruction indicating they are not liable for violation of the First Amendment.

III.

A VIOLATION OF DEFENDANTS' SEVENTH AMENDMENT RIGHTS IS A SUBSTANTIAL MATTER.

Much of plaintiff's thrust in the Motion to Dismiss or Affirm attacks defendants' "standing" to challenge the

remand in the nature of a remittitur by the Court of Appeals. There are no authorities cited in the motion for the proposition that defendants do not have standing. Plaintiff characterizes the remand as a "determination that a partial remittitur to a figure between $200,000 and $400,00 was appropriate since the jury did not have an opportunity to fully assess the impact of the equitable relief awarded by the district court" [Motion, p. 4]. That statement admits that the damage figure was in fact one for the jury to consider. And it admits that the jury did not have an opportunity to affix damages appropriately because they were not instructed as to the equitable relief awarded by the district court. The Seventh Amendment very plainly requires that the fact of damage is not to be resolved by the judge but rather by a jury fully informed of the evidence including

equitable relief to be awarded. Had a new trial on damages been ordered by the Court of Appeals or if it is ordered by this Court, the constitutional question under the Seventh Amendment would have been avoided. It is the only method of avoiding the constitutional question that does not lead to absurd results.

Plaintiff's argument regarding standing would lead to absurd results since the defendants, victimized by a verdict of either $514,000 or judge's order of $200,000 to $400,000, are injured in fact and denied a fair, fully informed jury evaluation of plaintiff's actual compensatory damages. This is particularly true since those figures are vastly in excess of all prior free speech teacher case awards that have been unreversed. Each of the cases cited by plaintiff in his motion are inapposite. The Alioto v. Cowles Communications, Inc., 430 F.Supp.

1363 (N.C.Cal. 1977), aff'd 623 F.2d 616 (CA 9, 1980), case is one involving libel. The Herrera v. Valentine, 653 F.2d 1220 (CA 8, 1981), case is one involving police brutality which caused the death of a stillborn child and the later death during trial of the plaintiff herself. The Moser v. Texas Trailer Corp., 623 F.2d 1006 (CA 5, 1980), case involved a personal injury, admiralty case and contributory negligence. We have set out in the margin the citations which were given to the Court of Appeals in our original comparative analysis which the Court of Appeals ignored in its decision.[1] Although we

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[1] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 252, 101 S.Ct. 2748, 2752 (1981) [$72,910]; Flores v. Pierce, 617 F.2d 1386, 1392 (CA 9, 1980), cert. denied 449 U.S. 875 [$48,500]; Brule v. Southworth, 611 F.2d 406, 411 (CA 1, 1979) [$2,000]; Konczak v. Tyrrell, 603 F.2d 13, 17-18 (CA 7, 1979), cert. denied 444 U.S. 1016 [$12,500]; Cruz v. Beto, 603 F.2d 1178, 1186 (CA 5, 1979) [$10,291]; Simineo v. School Dist. No.

(Footnote Continued)

believe that comparative analysis should have been followed by the Court of Appeals in ruling that the jury's verdict was excessive, that analysis also stands in stark contrast to the cases cited to this Court by the plaintiff.

Plaintiff, who has never missed a day's pay as a teacher as a result of any action of the defendants, claims to be similarly situated to Mrs. Herrera, now deceased, who suffered great pain and agony from the assault in her ninth month of pregnancy, causing the death of her unborn child. Plaintiff claims to be comparable to Mayor Alioto who was smeared with an unfair linkage to the Mafia

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(Footnote Continued)
16, 594 F.2d 1353, 1357 (CA 10, 1979) [$60,000]; Stoddard v. School Dist. No. 1, 590 F.2d 829, 835 (CA 10, 1979) [$33,000]; Linn v. Garcia, 531 F.2d 855, 860 (CA 8, 1976) [$1,250]; Peacock v. Board of Regents, etc., 597 F.2d 163 (CA 9, 1979) [$470,005, reversed as excessive]; Hanson v. Shell Oil Co., 541 F.2d 1352 (CA 9, 1976); and Scagnelli v. Whiting, 554 F.Supp. 77 (M.D.N.C. 1982).

because, as a defense counsel and an officer of the court, he provided legal services to criminal defendants and was of Italian ancestry. Plaintiff claims similarity to Moser who fell two stories, suffered a skull fracture, numerous other fractures and broken bones, and over $350,000 in lost wages. The facts of these cases are not even remotely like those in the record below. Plaintiff's attempts to claim the precedent of Herrera, Alioto or Moser must fail because they are so dissimilar.

Finally, plaintiff claims that there is ample basis in the case below to fix a remittitur between $200,000 and $400,000; but there are no references to testimony, argument, or instructions to differentiate the jury's verdict. Plaintiff presents no formula or method that the district court could use to fix a proper judgment between $200,000 and $400,000 or indeed even to

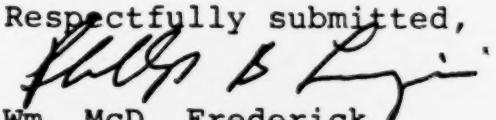
justify the bracket of $200,000 to $400,000. That is simply because one does not exist in the record. Had the jury differentiated its verdict such as $50,000 for loss of coaching, $50,000 for negative evaluations, $100,000 for loss of teaching at the high school level, $100,000 for damaged reputation in the community, and the balance for pain and suffering perhaps there would be a claim to excise only the objectionable amount dealing with reinstatement. There was no such computation at any time by any person involved in this trial. Therefore, any computation on this record is impossible. The only method of arriving at a non-erroneous verdict is a remand for a new trial.

CONCLUSION

For the reasons set out here and in the Jurisdictional Statement previously filed, the plaintiff's Motion to Dismiss

or Affirm should be denied. In the alternative, this Court should issue a writ of certiorari to consider the important questions and constitutional issues presented by the decisions below.

Respectfully submitted,



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